Petition

81-1686

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

WESTERN NUCLEAR, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the mineral reservation in Section 9 of the Stock-Raising Homestead Act, 43 U.S.C. 299, which reserved to the United States title to "all the coal and other minerals" in lands patented under the Act, includes gravel deposits susceptible of commercial exploitation.*

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* The plaintiff in the district court was Western Nuclear, Inc. The Wyoming Stock Growers Association, John Orr, and the Associated General Contractors of Wyoming were permitted to intervene as parties plaintiff. Defendants in the district court were Cecil B. Andrus, Secretary of the Interior, and the United States. Only Western Nuclear, Inc., appealed from the district court's decision. The Associated General Contractors of Wyoming, and the State of Utah, appeared as *amici curiae* in the court of appeals. Because Secretary Watt is the successor to Secretary Andrus, we have substituted Secretary Watt as a federal party in this case, pursuant to Rule 40.3 of the Rules of this Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No.

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

WESTERN NUCLEAR, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Secretary of the Interior and the United States of America, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-19a) is reported at 664 F.2d 234. The opinion of the district court (App. B, *infra*, 20a-38a) is reported at 475 F. Supp. 654. The opinion of the Interior Board of Land Appeals is reported at 85 I.D. 129 (App. C, *infra*, 45a-68a).

JURISDICTION

The judgment of the court of appeals (App. D, *infra*, 69a-70a) was entered on November 13, 1981. On February 3, 1982, Justice White extended the time for filing a petition for a writ of certiorari to March 13, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 9 of the Stock-Raising Homestead Act of 1916, 43 U.S.C. 299; Section 1 of the Materials Act of 1947, 30 U.S.C. 601; and Section 3 of the Surface Resources Act of 1955 (the Common Varieties Act), 30 U.S.C. 611, are set forth in App. E, *infra*, 71a-75a.

STATEMENT

1. The Stock-Raising Homestead Act of 1916 (SRHA), 43 U.S.C. 291 *et seq.*, was enacted "to restore and improve the grazing capacity, and therefore the stock-raising and meat-producing capacity, of the semiarid lands of the West, and at the same time to furnish homes thereon to the people." H.R. Rep. No. 626, 63d Cong., 2d Sess. 9 (1914). Section 2 of the Act, 43 U.S.C. 292, authorized the Secretary of the Interior to designate as stock-raising lands subject to entry under the Act: "lands the surface of which is, in his opinion, chiefly valuable for grazing and raising forage crops, [which] do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply, and are of such character that six hundred and forty acres are reasonably required for the support of a family * * *." An entryman was permitted, subject to certain conditions, to obtain a patent for up to 640 acres of lands so classified by the Secretary. 43 U.S.C. 293. However,

Section 9 of the Act, 43 U.S.C. 299, provided that all patents issued under the Act "shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same." [1]

In 1926, the United States conveyed certain lands near Jeffrey City, Wyoming, pursuant to the SRHA. The patent contained the following reservation (App. B, *infra*, 21a):

> Excepting and reserving, however, to the United States all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same pursuant to the provisions and limitations of the Act of December 29, 1916.

In 1975 respondent, Western Nuclear, Inc., purchased the outstanding interest in a portion of the patented lands and applied to the Wyoming Department of Environmental Quality, a state agency, for a permit to develop a gravel pit. After obtaining the permit, Western Nuclear removed approximately 43,000 cubic yards of gravel from the site (App. B, *infra*, 21a).

On November 3, 1975, the Wyoming State Office of the Bureau of Land Management (BLM) served Western Nuclear with notice that its gravel operation constituted a trespass against the United States. The BLM determined that the gravel had been reserved to the United States when the lands were patented under

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[1] Sections 1-8 of the SRHA, 43 U.S.C. 291-298, were repealed by Section 702 of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2787. The repeal does not affect this controversy.

the SRHA, and consequently that the extraction and removal of the gravel was a violation of the Materials Act of 1947, 30 U.S.C. 601 *et seq.*[2] The BLM concluded that Western Nuclear was liable to the United States for $13,000 for the gravel removed from the tract (App. B, *infra*, 22a).

Western Nuclear then appealed the BLM's determination to the Interior Board of Land Appeals (IBLA), which affirmed. (App. C, *infra*, 45a-68a). The IBLA concluded that the language and purposes of the Act, as well as its legislative history, made clear that gravel "is a mineral reserved to the United States in patents issued under the Stock-Raising Homestead Act" (App. C, *infra*, 65a).[3]

2. Respondent then filed this action under 28 U.S.C. 1331(a) and the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, seeking review of the IBLA's deci-

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[2] Section 1 of the Materials Act of 1947, 30 U.S.C. 601, authorizes the Secretaries of the Interior and Agriculture to dispose of common varieties of gravel and similar substances found on the public lands to private parties upon the payment of adequate compensation as determined by the Secretary administering the area. Section 3 of the Surface Resources Act, 30 U.S.C. 611, generally known as the Common Varieties Act, provides that no deposit of common varieties of gravel and similar substances "shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States * * *." Consequently, private parties now seeking to exploit deposits of common varieties of gravel occurring on the public lands must comply with the provisions of the Materials Act of 1947, and the applicable regulations. See *United States* v. *Coleman*, 390 U.S. 599, 604 (1968).

[3] The IBLA adjusted the damages to $12,802.50 (App. C, *infra*, 67a).

sion. The complaint alleged that the IBLA had erred in determining that the mineral reservation in the SRHA extended to gravel. Respondent also claimed that the Department of the Interior lacked jurisdiction to determine whether the United States still retained ownership of the gravel. The district court concluded that: "it is evident from the legislative history, contemporaneous definitions and court decisions that the mineral reservation in the SRHA of 1916 is broad enough to include gravel as a mineral" (App. B, *infra*, 38a). The court also rejected respondent's assertion that the Secretary of the Interior lacked authority to consider the question of ownership of their mineral estate in lands patented under the SRHA (App. B, *infra*, 22a).[4]

The court of appeals reversed (App. A, *infra*, 19a). It first held that the Secretary had jurisdiction to consider the extent of the mineral reservation in lands patented under the SRHA, and to determine whether the removal of gravel from patented lands

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[4] Though it sustained the IBLA's determination concerning the scope of the SRHA mineral reservation, the district court ordered "that the element of damages shall be determined by the collaboration of the Wyoming State Office of the Bureau of Land Management and the landowners, Western Nuclear, Inc." (App. B, *infra*, 40a). The court later amended its judgment to indicate that it might not reach the same conclusions under different factual circumstances. This amended judgment was entered upon the stipulation of the government and the intervenors, Wyoming Stock Grower's Association, John Orr, and the Associated General Contractors. Among other things, the intervenors expressed concern that the judgment as originally entered might have the effect of barring a surface owner from using gravel on the lands where the use was related to the stock-raising purposes of the Act (App. B, *infra*, 43a-44a).

constituted a trespass against the United States (App. A, *infra*, 6a-9a). The court concluded, however, that the reservation of "coal and other minerals" in Section 9 of the SRHA did not extend to gravel. The court first noted that gravel is not generally considered a mineral in private conveyances involving a mineral estate (App. A, *infra*, 10a-11a). The court also determined that the datum most relevant to the intent of Congress was a 1910 decision by the Department of the Interior, *Zimmerman* v. *Brunson*, 39 I.D. 310. In that case the Department had decided that deposits of sand and gravel did not render the lands on which they were found "mineral in character" within the meaning of the general mining laws (App. A, *infra*, 12a-13a). Third, the court relied (App. A, *infra*, 14a-15a) upon its prior decision in *Bumpus* v. *United States*, 325 F.2d 264 (1963). The United States there had condemned the surface estate, but had left the owner with a subsurface estate "including all oil, gas and other minerals * * *." The court in *Bumpus* had held that the subsurface estate did not include gravel (*id.* at 267). Finally, the court below relied upon two state decisions which, under analogous circumstances, had held that a reservation of "all coal and other minerals" did not include gravel (App. A, *infra*, 17a-19a).[5]

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[5] One of these cases, *State ex rel. State Highway Commission* v. *Trujillo*, 82 N.M. 694, 487 P.2d 122 (1971), concerned the same issue presented here: whether the mineral reservation of Section 9 of the SRHA extends to deposits of gravel. The other state case, *State Land Board* v. *State Department of Fish & Game*, 17 Utah 2d 237, 408 P.2d 707 (1965), did not arise under the SRHA. It involved a conveyance from the State of Utah which reserved to the State "all coal and other minerals."

REASONS FOR GRANTING THE PETITION

The decision by the court of appeals erroneously resolved an important question regarding the administration of the more than 70 million acres of land subject to the Stock-Raising Homestead Act. If not corrected by this Court, that decision revokes the government's title to all the gravel located on those lands, and may affect conveyances already made, many of them to states and their political subdivisions under free use permits. The court's conclusion is inconsistent with the history and language of the Act, and contradicts the understanding of Congress and the consistent practice of the Department of the Interior.

1. Since passage of the Stock-Raising Homestead Act in 1916, the government has granted patents on approximately 70 million acres in the Western states—an aggregate area the size of the State of Nevada. See United States Department of the Interior, Bureau of Land Management, *Public Land Statistics 1980*, Table 24 at 50. All of those lands were disposed of subject to the mineral reservation in Section 9 of the Act, 43 U.S.C. 299. As a result, the government since that time has been free to convey the mineral rights, including the rights to gravel and similar materials located on those lands. In fiscal year 1980 the government disposed of more than $22 million worth of such materials from both public domain lands and SRHA lands.[6] *Public Land Statistics 1980*,

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[6] The Department of the Interior does not keep separate statistics for dispositions made from SRHA lands, so it is difficult to say with certainty what fraction of that amount is attributable to SRHA lands. In addition to gravel, the materials disposed of included sand, lightweight aggregate, asphalt aggregate, common borrow, road base, industrial mineral, and smaller quantities of other materials. *Public Land Statistics 1980, supra*, Table 75 at 105-106.

supra, Table 75 at 105-106. Although the present case involves only title to gravel, the approach taken by the court of appeals may easily be extended to cover similar materials such as sand and commercially exploitable varieties of stone.

Not only does the decision preclude the government from making future sales of such materials, it also could subject those who have acquired them in the past from the government to claims of trespass by patentees whose land has been mined.[7] In addition, mining claimants before 1955 were permitted to locate gravel, sand, and similar deposits on SRHA lands. Upon acquiring a patent, they succeeded to whatever interest the United States had in those lands. See 43 U.S.C. 299; 30 U.S.C. 29.[8] The decision by the court of appeals clouds the title of such claimants.

The burden of the Tenth Circuit's error may fall most harshly on the Western states themselves. Under 30 U.S.C. 601 and 43 C.F.R. 3621.2, states and their political subdivisions are allowed to make free use of mineral materials such as gravel on SRHA lands, "without limitation as to the number of permits or as to the value of the mineral materials to be ex-

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[7] Since passage of the Common Varieties Act, 30 U.S.C. 611, common varieties of gravel have been disposed of by sale, without any grant of rights to the land on which they are found. See note 2, *supra*. If such dispositions are improper under the court of appeals' decision, the patentee's trespass claim would presumably be extinguished at some point by the applicable statute of limitations.

[8] Uncommon varieties of gravel, sand, stone, and similar materials do not fall within the exclusionary language of 30 U.S.C. 611, and are still considered locatable minerals subject to patent under mining laws.

tracted," provided the materials are used for public projects. Of the $22 million worth of such materials disposed of by the government in fiscal 1980 from all lands administered by the BLM, more than $18 million was taken by the states and their subdivisions under free use permits. *Public Land Statistics 1980, supra*, Table 75 at 105-106.

2. The decision below is especially significant because more than 45 million of the 70 million acres patented under the SRHA are located in states within the Tenth Circuit. Nearly all the remaining SRHA lands are within the Ninth Circuit (*Public Land Statistics 1980, supra*, Table 24 at 50),[9] which has indicated its disagreement with the narrow construction of Section 9 adopted by the Tenth Circuit in this case. In *United States* v. *Union Oil Co. of California*, 549 F.2d 1271, cert. denied, 434 U.S. 930 (1977), the Ninth Circuit held that geothermal steam was a mineral encompassed by the reservation in Section 9 of the SRHA. Though geothermal power was a resource unknown to the Congress which adopted the Act, and even though the Department of the Interior had expressed the opinion that geothermal steam was not a "mineral" within the intent of the reservation, the court found in the Act a clear purpose to separate the surface from the subsurface estate, to enable the entryman to engage in stock-raising and forage farming, and to reserve to the United States the right to use the lands for commercial extraction and removal of minerals. 549 F.2d at 1273-1275, 1279-1280.[10]

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[9] Table 24 indicates that nearly 96% of SRHA lands fall within the Ninth and Tenth Circuits.

[10] The Ninth Circuit relied (549 F.2d at 1276 n.11) in part on an earlier Tenth Circuit case, *Skeen* v. *Lynch*, 48 F.2d 1044 (1931), which held that oil and gas were reserved minerals

3. In interpreting Section 9's reservation of "all the coal and other minerals," it is important to heed this Court's admonition that "[t]he word 'mineral' is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its significance in a given case." *Northern Pacific Ry.* v. *Soderberg*, 188 U.S. 526, 530 (1903). Proper attention to context in this case makes clear that the court of appeals' decision is at odds with the history and language of the SRHA, and contradicts the understanding of Congress and the consistent practice of the Department of the Interior.

a. Shortly after the turn of this century, the United States began to recognize the unwisdom of classifying, and disposing of, government lands as either wholly mineral or nonmineral in character. Congress reacted first by permitting disposition of lands with a reservation of only certain specified minerals. See Act of March 3, 1909, 30 U.S.C. 81 (coal); Act of June 22, 1910, 30 U.S.C. 83 (coal); Act of April 30, 1912, 30 U.S.C. 90 (coal); Agricultural Entry Act of 1914, 30 U.S.C. 121 *et seq.* (phosphate, nitrate, potash, oil, gas, and asphaltic minerals). It shortly abandoned that approach, however, in favor of a reservation to the United States of all minerals. The terms of the reservation varied, but generally provided that the United States would re-

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within the compass of Section 9. The court in *Skeen* rejected a claim that the phrase "coal and other minerals" meant minerals ejusdem generis, because it understood the legislative history of the SRHA to dictate a clear separation of the surface and subsurface estates. 48 F.2d at 1046-1047.

tain "all the coal and other minerals," [11] "all coal, oil, gas and other minerals," [12] or simply "all minerals." [13] In all such cases, the purpose of the reservation was the same: to sever from the surface estate all mineral substances which had separate value and could be taken from the soil.

It was in this context that Congress considered passage of the SRHA. Although no one specifically focused on commercially exploitable deposits of gravel, the history of the Act does disclose an intention to effect a very broad mineral reservation. For example, in recommending passage of the bill, the Department of the Interior stated that "[a]ll mineral[s] within the lands are reserved to the United States, together with the right of qualified persons to prospect upon, locate, and enter such deposits * * *." H.R. Rep. No. 35, 64th Cong., 1st Sess. 5 (1916). Interior further stated that "[t]he farmer-stockman is not seeking and does not desire the minerals, his experience and efforts being in the line of stock raising and farming * * *." *Ibid.* The House Report noted that "[t]he purpose of [the reservation] is to limit the operation of this bill strictly to the surface

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[11] Stock-Raising Homestead Act of 1916, 43 U.S.C. 299; Color of Title Act of 1928, 43 U.S.C. 1068 ("coal and all other minerals"); Underground Water Reclamation Act of 1919, ch. 77, Section 8, 41 Stat. 295 ("all the coal and other valuable minerals") (repealed 1964).

[12] Bankhead-Jones Farm Tenant Act of 1937, ch. 517, Section 44, 50 Stat. 530 (three-fourths interest in "all coal, oil, gas and other minerals" (repealed 1961).

[13] Taylor Grazing Act of 1934, ch. 865, Section 8, 48 Stat. 1272 ("mineral deposits") (repealed 1976); Recreation Act of 1926, 43 U.S.C. 869-1 ("all mineral deposits"). Cf. Federal Land Policy and Management Act of 1976, Section 209(a), 43 U.S.C. 1719(a) ("all minerals").

of the lands described and to reserve to the United States the ownership and right to dispose of all minerals underlying the surface thereof. This section also provides a method for the joint use of the surface of the land by the entryman * * * and the person who shall acquire from the United States the right to prospect * * * and remove all minerals * * *." *Id.* at 18. The floor debates reinforce this conclusion. Congressman Ferris, manager of the bill, stated that "it would cover every kind of mineral. All kinds of minerals are reserved * * *." 53 Cong. Rec. 1171 (1916).

b. The provisions of the Act itself confirm this understanding of the limited nature of the patentee's interest, and the correspondingly broad terms of the government's reserved estate. As originally passed, the Act provided that one who acquired the right to remove mineral deposits could occupy as much of the surface as necessary for the removal, and was required to pay damages to the surface owner only for "the crops or tangible improvements." 43 U.S.C. 299. Representative Mondell rightly pointed out that this provided "no * * * payment for the land itself." 53 Cong. Rec. 1233 (1916). That omission was rectified in 1949, but the surface owner was then, and now, given only the additional right to recover for damage to the grazing value of the surface estate. 30 U.S.C. 54 provides:

> "* * * any person who * * * removes by strip or open pit mining methods, any minerals from any land included in a stock raising * * * homestead entry or patent, and who had been liable under * * * [the Stock-Raising Homestead] Act only for damages caused thereby to the crops or improvements of the entryman or patentee, shall

> also be liable for any damage that may be caused to the value of the land for grazing * * *."

The Act and its modifications thus provide what amounts to an itemized list of the patentee's interests in SRHA lands: in addition to improvements and crops for which he himself is responsible, the surface owner's estate extends to the land itself only insofar as it is valuable for stock-raising purposes. See S. Rep. No. 405, 81st Cong., 1st Sess. 3 (1949).

c. Though the issue in this case turns on the intent of Congress when it passed the SRHA, it is worthy of note that Congress has subsequently indicated its awareness that gravel would be treated as a mineral for purposes of the general mining laws. The SRHA at the time of its enactment provided that the government could dispose of its interest in reserved minerals "in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal." 43 U.S.C. 299. And under the general mining laws, gravel was thereafter treated as a locatable mineral. It was for that reason, in part, that the Surface Resources Act was passed in 1955. 30 U.S.C. 611 provides that gravel shall not be "deemed a valuable mineral deposit within the meaning of the mining laws of the United States," because of the many problems which such treatment had caused in the past. See H.R. Rep. No. 730, 84th Cong., 1st Sess. 5-6, 8 (1955).

Not only Congress, but the Department of the Interior, too, has consistently recognized that gravel would be treated as a mineral reserved to the United States under Section 9 of the SRHA. See *United States* v. *Isbell Construction Co.*, 78 I.D. 385, 393 (1971); *Solicitor's Opinion*, M-36417 (Feb. 15, 1957).

Cf. *Layman* v. *Ellis*, 52 I.D. 714 (1929). See also *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 606-608 (1978).

The court of appeals relied heavily on the fact that the Secretary of the Interior had ruled, six years before the SRHA was passed, that deposits of gravel and sand suitable for making concrete did not render land mineral in character, and therefore bar entry under homestead laws. *Zimmerman* v. *Brunson*, 39 I.D. 310 (1910). But that ruling has little value as an aid to understanding the SRHA, since calling gravel a mineral under the SRHA does not bar a stockraising homestead entry; rather, it allows multiple uses to be made of the land. Moreover, even as an interpretation of the mining and homestead laws, the *Zimmerman* decision was both short-lived and ill respected within the Department. See *Layman* v. *Ellis*, *supra*, 52 I.D. at 721 (overruling *Zimmerman*); United States Geological Survey, Department of the Interior, Bulletin 537, *The Classification of the Public Lands* 138-142 (1913).

4. The court of appeals' narrow construction of the scope of Section 9 is directly contrary to this Court's long-established rule that, when grants to federal lands are at issue, any doubts concerning the meaning of the statute "are [to be] resolved for the government, not against it." *United States* v. *Union Pacific R.R.*, 353 U.S. 112, 116 (1957); *Andrus* v. *Charlestone Stone Products Co.*, *supra*, 436 U.S. at 617. It is particularly inappropriate to read the government's mineral reservation narrowly when the relevant statutory and historical context, and the subsequent Congressional and administrative understanding, all weigh in favor of a broad interpretation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1982

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 79-2290

WESTERN NUCLEAR, INC., a Delaware corporation, authorized and doing business in the State of Wyoming, PLAINTIFF-APPELLANT

v.

CECIL ANDRUS, Secretary of the United States Department of the Interior, and the UNITED STATES, DEFENDANT-APPELLEES

and

WYOMING STOCK GROWERS ASSOCIATION, JOHN ORR and ASSOCIATED GENERAL CONTRACTORS OF WYOMING, INTERVENORS

STATE OF UTAH and
ASSOCIATED GENERAL CONTRACTORS OF WYOMING,
AMICI CURIAE

Filed Nov. 13, 1981

Appeal from the United States District Court
for the District of Wyoming
(D.C. Civil No. C78-129K)

Before McWILLIAMS and BREITENSTEIN, Circuit Judges, and CHILSON, District Judge.*

McWILLIAMS, Circuit Judge.

The central issue in this appeal concerns the meaning and scope of a mineral reservation in a patent granted under the Stock-Raising Homestead Act of 1916. Specifically, the question before us is whether gravel is included in the reservation of "coal and other minerals." The Wyoming Office of the Bureau of Land Management (BLM), the Interior Board of Land Appeals (IBLA), and the United States District Court for the District of Wyoming all concluded that gravel is a mineral reserved to the United States in a patent issued pursuant to the Stock-Raising Homestead Act of 1916. We conclude that the gravel here involved is not a reserved mineral, and therefore reverse.

The current dispute involves a tract of land situate in the State of Wyoming, which was conveyed by the United States to appellant's predecessor-in-interest on February 4, 1926, by Patent No. 974013, issued pursuant to the Stock-Raising Homestead Act of 1916.[1] In accord with the provisions of the Act, the patent contained the following reservation:

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* Honorable Hatfield Chilson, United States District Judge for the District of Colorado, sitting by designation.

[1] Act of December 29, 1916, ch. 9, 39 Stat. 862, 43 U.S.C. §§ 291-302 (1976). The Stock-Raising Homestead Act was suspended effectively by executive action pursuant to the Taylor Grazing Act of June 28, 1934, ch. 865, 48 Stat. 1269, 43 U.S.C. § 315 (1976). The Stock-Raising Homestead Act was repealed officially by the Federal Land Policy and Man-

> Excepting and reserving, however, to the United States *all the coal and other minerals* in the lands so entered and patented, together with the right to prospect for, mine, and remove the same pursuant to the provisions and limitations of the Act of December 29, 1916. (emphasis added).

Western Nuclear, Inc., the appellant, has been involved in the mining and milling of uranium ore in and around Jeffrey City, Fremont County, Wyoming, for more than twenty years. From time to time during those years Western Nuclear obtained, from various sources, gravel, which it used for road surfacing, paving aggregate, shaft concrete aggregate, and the like. In 1975, Western Nuclear acquired, in fee, a portion of the land subject to the 1926 patent and proposed to meet its future gravel needs from an open gravel pit located on the acquired premises.[2] Western Nuclear first secured a permit for development of the gravel pit from the Wyoming Department of Environmental Quality and then proceeded to extract gravel from the pit. It thereafter removed some 43,000 cubic yards of gravel to further its own commercial operations.

Later, the Wyoming Office of the BLM cited Western Nuclear for trespass. After hearing, the BLM

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agement Act of 1976, Pub. L. No. 94-579, § 702, 90 Stat. 2787, 43 U.S.C. §§ 1701-1783 (Supp. II 1978). Valid existing patents such as the one belonging to the appellant were unaffected by the repeal.

[2] Appellant's land is semi-arid, with the little vegetative cover consisting mainly of sagebrush. The gravel is overlaid by a soil cover of loamy sand less than two feet thick. Western Nuclear, Inc., 85 Interior Dec. 129, 132 (1978).

entered its decision, which held, in substance, that the gravel on and underlying Western Nuclear's land had been reserved to the United States under the 1926 patent and that Western Nuclear had committed an unintentional trespass on federally-owned minerals by extracting and removing such gravel.[3] Western Nuclear was held liable for $13,000 in damages, such sum representing the value of the gravel which Western Nuclear had removed from the land.

Western Nuclear appealed the decision of the BLM to the United States Department of the Interior. On review, the IBLA held that the BLM did have jurisdiction over the subject matter of the dispute and that the gravel in question had been reserved to the United States in the 1926 patent. Because of a slight mathematical miscalculation, the damage award was reduced from $13,000 to $12,802.50. The opinion of the IBLA appears at 85 Interior Dec. 129 (1978).

Thereafter, Western Nuclear initiated the present proceeding, which it denominated as a "Complaint/Petition for Review," in the United States District Court for the District of Wyoming, asking that the

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[3] The BLM citation alleged a violation of the Materials Act of July 31, 1947, ch. 406, 61 Stat. 681, *as amended by* the Surface Resources (Common Varieties) Act of July 23, 1955, ch. 375, 69 Stat. 367, 30 U.S.C. §§ 601-615 (1976). The Materials Act, as amended, authorizes the Secretaries of the Interior and Agriculture to dispose of *common varieties* of gravel and other mineral materials found on the public lands of the United States to private parties upon the payment of adequate compensation therefor. 30 U.S.C. § 601. The Act further provides that no deposit of *common varieties* of sand and gravel can be deemed a valuable mineral deposit within the meaning of the mining laws. 30 U.S.C. § 611. The Act continues, however, to permit the location of such mineral materials under the mining laws if the minerals are shown to possess a "distinct and special value."

IBLA decision be set aside and that the trial court quiet Western Nuclear's title to the gravel in question. Jurisdiction was based on 5 U.S.C. § 704 (1976) and 28 U.S.C. § 1331(a) (1976).

On judicial review, the trial court generally affirmed the decision of the IBLA, although the trial court ordered "that the element of damages shall be determined by the collaboration of the Wyoming State Office of the Bureau of Land Management and the landowners, Western Nuclear, Inc." Specifically, the Honorable Ewing T. Kerr, after an analysis of the legislative history, contemporaneous definitions and court decisions, concluded that gravel is a mineral within the meaning of the mineral reservation of the Stock-Raising Homestead Act. *See* Western Nuclear, Inc. v. Andrus, 475 F. Supp. 654 (D. Wyo. 1979). Western Nuclear now appeals.[4]

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[4] In the trial court, the Wyoming Stock Growers Association, John Orr, and the Associated General Contractors of Wyoming were permitted to intervene as parties plaintiff. The basis for such intervention was that they too had an interest in lands patented under the Stock-Raising Homestead Act of 1916 and subject to the same mineral reservation as Western Nuclear. The Memorandum Opinion of the trial court, appearing at 475 F. Supp. 654 (D. Wyo. 1979), was entered on August 27, 1979, but it makes no mention of any intervenors. By a subsequent order, dated November 14, 1979, the trial court amended its earlier judgment to reflect that it had made no findings concerning the evidence submitted by the intervenors. The court decreed that the intervenors were not barred from raising, in the future, issues of fact or law concerning their property rights in sand and gravel patented pursuant to the Stock-Raising Homestead Act and that the earlier opinion "shall not be *res judicata* of the individual intervenors' rights in other fact situations."

Only Western Nuclear filed a notice of appeal, which was directed to the Memorandum Opinion of August 27, 1979,

In this Court, Western Nuclear's primary argument is that gravel is not a reserved mineral, and that the trial court erred in affirming the IBLA's holding that the gravel was reserved to the United States. Western Nuclear alternatively contends that if the first issue be resolved adversely to it, then we should address ourselves to Western Nuclear's second argument that the BLM lacked subject-matter jurisdiction and, therefore, had no authority to issue the trespass notice. We believe that the jurisdictional issue and the question of whether gravel is a mineral reserved under the 1926 patent are, to a degree at least, interrelated. As concerns jurisdiction, the trial court simply rejected that issue with the brief comment that "this argument lacks merit." 475 F. Supp. at 656.

The trespass notice served on Western Nuclear by the BLM stated that, in the opinion of the Secretary of the Interior, Western Nuclear had removed federally-owned materials without authorization and, in so doing, had violated the Materials Act of 1947 and the Surface Resources (Common Varieties) Act of 1955, and 43 C.F.R. § 9239.0-7 (1980). That regulation provides as follows:

> The extraction, severance, injury, or removal of timber or mineral materials *from public lands under the jurisdiction of the Department of the Interior*, except when authorized by law and the regulations of the Department, is an act of tres-

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and to the subsequent order of the trial court denying Western Nuclear's motion to alter or amend judgment In this Court, the Associated General Contractors of Wyoming, but not the Wyoming Stock Growers Association, appears as *amicus curiae*. The State of Utah also appears here as *amicus curiae* in support of Western Nuclear's position.

> pass. Trespassers will be liable in damages to the United States and will be subject to prosecution for such unlawful acts. (emphasis added).

Western Nuclear points out that this regulatory prohibition is restricted to the "public lands," and that the Materials Act of 1947 and the Surface Resources (Common Varieties) Act of 1955 also are limited in scope because they authorize the disposition of gravel from "public lands" only. The basic theme of Western Nuclear's argument that the BLM was without jurisdiction in this case, therefore, is that the land here involved was patented in 1926, and, accordingly, such was no longer "public land" as of the date of the notice of trespass in 1975.

We recognize that the United States Supreme Court has consistently held that the term "public lands" means lands which are subject "to sale or other disposal under general laws." Northern Lumber Co. v. O'Brien, 204 U.S. 190, 196 (1907); Bardon v. Northern Pacific Railroad Co., 145 U.S. 535, 538 (1892); Newhall v. Sanger, 92 U.S. 761, 763 (1876). The term generally does not include lands to which any claims or rights of others have attached. Payne v. Central Pacific Railway Co., 255 U.S. 228, 237-38 (1921). Under the general rule, therefore, "privately held lands in which the United States has retained mineral rights . . . are not 'public lands' as defined by the Supreme Court because they clearly are not subject to sale under general laws, and there certainly are other claims or rights attached to them." Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585, 598 (9th Cir. 1981).

The general rule, however, does not, in our view, resolve the present jurisdictional dispute. At the heart of the present controversy is the Stock-Raising Home-

stead Act, 43 U.S.C. § 299 (1976), which not only requires that patents issued under the Act contain the mineral reservation above set out, but also provides that the reserved mineral interests are "subject to disposal by the United States in accordance with the provisions of the coal and mineral laws in force at the time of such disposal." In our view, this statute contemplates that the Department of the Interior should have continuing jurisdiction over, and administration of, mineral interests reserved to the United States under the Stock-Raising Homestead Act until such time as those interests are disposed.

In concluding that the BLM's exercise of jurisdiction was appropriate in this case, we note that the Secretary of the Interior has broad authority as general manager over the federal lands. The United States Supreme Court has affirmed many times the sweeping scope of the Secretary's powers. *See* Boesche v. Udall, 373 U.S. 472, 476-78 (1963); Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336-37 (1963); Cameron v. United States, 252 U.S. 450, 459-64 (1920). Further, Congress has provided that:

> The Secretary of the Interior or such officer as he may designate shall perform all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government. 43 U.S.C. § 2 (1976).

And the Secretary is further authorized "to enforce and carry into execution, by appropriate regulations, every part of the provisions of [Title 43] not otherwise provided for." 43 U.S.C. § 1201 (1976).

All things considered, we are of the view that the BLM had the authority to cite Western Nuclear for the alleged trespass on mineral interests retained by the United States in the 1926 patent. Pursuant to such authority, the BLM properly held a hearing to determine whether, in fact, there was such a trespass.

We now turn to the primary issue presented by this appeal, *i.e.*, whether gravel is a mineral reserved to the United States in a patent issued pursuant to the Stock-Raising Homestead Act. Gravel, as defined by the dictionary, is "small stones, or fragments of stone often intermixed with particles of sand." Black's Law Dictionary 830 (rev. 4th ed. 1968). A dictionary definition, however, is not necessarily of any great value. In this connection, the Supreme Court, in Northern Pacific Railway Co. v. Soderberg, 188 U.S. 526, 530 (1903), commented as follows:

> The word "mineral" is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case. Thus the scientific division of all matter into the animal, vegetable or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom, and therefore could not be excepted from the grant without being destructive of it. Upon the other hand, a definition which would confine it to the precious metals, gold and silver, would so limit its application as to destroy at once half the value of the exception. Equally subversive of the grant would be the definition of minerals found in the Century Dictionary: as "any constituent of the earth's crust; . . . .

The gravel deposit involved in the instant case is described in the BLM report as follows:

> The deposit located on the property is an alluvial gravel with 6.4 acres of the 14 acre parcel mined for gravel. . . . There are 6-12 inches of overburden on the site . . . . It is estimated that the deposit thickness will average 10 feet or more in thickness. In the nature of speculation, the deposit could cover up to 40 acres, however, this report is restricted to the 6.4 acre area mined. 85 Interior Dec. at 131.

The subject gravel is also referred to in that same BLM report by a geologist as follows:

> The gravel is overlain [sic] by a soil cover of fairly well developed loamy sand, some 12-18 inches in thickness. There is a relatively good vegetative cover, consisting mainly of sagebrush, and an understory of various native grasses. *Id.* at 132.

There is a diversity of judicial thought on the recurring question of whether ordinary gravel, which is primarily used, as it is in the instant case, as an aggregate in the mixing of concrete, is a mineral. An annotation appearing at 95 A.L.R. 2d (1964) states the general rule to be that gravel is not included within the meaning of the word "mineral" as that term is used in conveyances either granting or reserving mineral interests.[5] 54 Am. Jur. 2nd, *Mines and Minerals* § 8 (1971), reads:

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[5] *See, e.g.*, Bambauer v. Menjoulet, 214 Cal. App. 2d 871, 29 Cal. Rptr. 874, 95 A.L.R. 2d 839 (1963) (gravel not a mineral in deed reserving "all mineral and oil rights" because commercial gravel has no definite chemical composition); Morrison v. Socolofsky, 600 P.2d 121 (Colo. App. 1979) (where gravel underlies topsoil of entire tract and surface owner purchased land for farming and gravel removal would

Generally, on the ground that they did not possess exceptional qualities or value, but are only part of the soil itself, sand, gravel and clay are not considered minerals, although there is some contrary authority. Even if the clay, sand or gravel is not actually part of the surface and can be obtained only by destroying the surface, it has been held not to constitute a "mineral."

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destroy the agricultural usefulness, parties did not intend to include gravel within mineral reservation); Farrell v. Sayre, 129 Colo. 368, 270 P.2d 190 (1954) (where sand and gravel constitute the surface of the land, a straight mineral reservation does not reserve the sand and gravel); Holloway Gravel Co. v. McKowen, 200 La. 917, 9 S.2d 228 (1942) (sand and gravel not contemplated as reserved by a mineral reservation because such would be inconsistent with trade usage); Beck v. Harvey, 196 Okla. 270, 164 P.2d 392 (1944) (conveyance or reservation using term "mineral royalty" does not include sand and gravel even when the property involved has sand and gravel susceptible of commercial production); Atwood v. Rodman, 355 S.W.2d 206 (Tex. Civ. App. 1962) (gravel, being unexceptional in character, not considered a mineral within ordinary meaning); Heinatz v. Allen, 147 Tex. 512, 217 S.W.2d 994 (1949) (sand and gravel used only for building and roadmaking purposes are not minerals in the ordinary and natural meaning of the word); Waring v. Foden, 1 Ch. 276, 86 A.L.R. 969 (Eng. 1932) (reservation of "all mines, minerals, and mineral substances" does not include gravel especially where the gravel constitutes a large part of the soil and removal of gravel would deprive the surface owner of the substance of the transaction). *Compare* United States v. Harris, 115 F.2d 343 (5th Cir. 1940) (applying Alabama law) (term "minerals" not limited to metallic substances, and meaning of term to be determined from language of grant of reservation, surrounding circumstances, and intention of grantor, if ascertainable) *with* Harper v. Talladega County, 185 S.2d 388 (Ala. 1966) (conveyance of "all the coal, iron ore, and other minerals" does not include common sand and gravel).

In construing the phrase "coal and other minerals," as such appears in the Stock-Raising Homestead Act of 1916, our primary task is to ascertain congressional intent. This Court previously has held that the general intent of Congress in enacting the Stock-Raising Homestead Act of 1916 was to separate the surface estate from the mineral estate, granting the former to the patentee for the purpose of raising cattle, and reserving "all of the latter to the United States." Skeen v. Lynch, 48 F.2d 1044, 1046 (10th Cir.), *cert. denied*, 284 U.S. 633 (1931). However, neither the Act itself, nor, in our view, the congressional debate leading up to the passage of the Act, indicate whether Congress intended that ordinary gravel be deemed part of the mineral estate. The legislative history of the Act is reviewed fully in the trial court's opinion, 475 F. Supp. at 656-59, and in United States v. Union Oil Co., 549 F.2d 1271, 1273-79 (9th Cir. 1977), and will not be repeated here.

The Act should be viewed in its historical setting. In 1910, the Department of the Interior held that deposits of sand and gravel suitable for mixing with cement for concrete construction did not render the land in which they were found mineral in character within the meaning of the mining laws, or bar entry under the homestead laws. Zimmerman v. Brunson, 39 Interior Dec. 310 (1910). In *Zimmerman*, the Secretary stated that "the Department, in the absence of specific legislation by Congress, will refuse to classify as mineral land containing a deposit of material not recognized by standard authorities as such, whose sole use is for general building purposes, and whose chief value is its proximity to a town or city, in contradistinction to numerous other like deposits of the same character in the public domain."

Id. at 313. The Secretary rested his conclusion upon "a search of the standard American authorities [which] failed to disclose a single one which classifie[d] a deposit [of gravel] as a mineral." *Id.* at 312. The Secretary dismissed Zimmerman's mineral entry, and ordered that Brunson's homestead entry remain intact. It is evident, therefore, that the Department of the Interior, as of 1910, did not classify gravel as a mineral.

A few years after *Zimmerman*, the Department of the Interior began the preliminary drafting of legislation which eventually became the Stock-Raising Homestead Act of 1916. It is highly improbable that the Department of the Interior in its drafting of the Act was unaware of its own ruling in *Zimmerman*. Similarly, when enacting the Stock-Raising Homestead Act of 1916, we presume that Congress was aware of the fact that the Department of the Interior had determined that gravel was not a mineral for the purpose of either the mining laws or previous homestead laws. In this regard, we are aware, of course, that in 1929 the Department, in effect, overruled *Zimmerman* and held that gravel was a locatable mineral. Layman v. Ellis, 52 Interior Dec. 714 (1929). That, to us, is of no particular significance to the present controversy. The important thing is that as of 1916 the Department of the Interior had held that gravel was not "mineral" and such, we believe, sheds considerable light on the question of the intent of Congress in the enactment of the Stock-Rasing Homestead Act of 1916.

Although, as indicated above, there is a contrariety of judicial expression on the question of whether gravel is a mineral, we do find some guidance in the case law. In this regard, our attention has been

drawn to one, and only one, Tenth Circuit case involving a patent issued under the Stock-Raising Homestead Act of 1916. *See* Skeen v. Lynch, 48 F.2d 1044 (10th Cir.), *cert. denied*, 284 U.S. 633 (1931). *Skeen* involved a patent issued under that Act, which, as indicated, reserved to the United States "all coal and other minerals." In that case, the Tenth Circuit opined that the *assumption* by the parties that the term "other minerals" included oil and gas was "irrefutable." In *Skeen*, the Tenth Circuit rejected the argument that "coal and other minerals" meant "coal and other material like coal,"—*noscitur a sociis*.

In discussing the legislative history of the Stock-Raising Homestead Act, the Court, in *Skeen*, stated that the intent of Congress was to separate the surface estate from the mineral estate, reserving "all of the latter to the United States." We agree with *Skeen* that the mineral estate, and all of it, is reserved to the United States in patents issued under the Act. Such, however, does not tell us just what substances are to be deemed part of the mineral estate. The Court in *Skeen* held, in effect, that oil and gas is a reserved mineral, but, in our view, it does not necesarily follow that gravel also is a reserved mineral. There is considerable difference between oil and gas and ordinary sand and gravel.

Another Tenth Circuit case worthy of mention, even though it did not involve a patent issued under the Stock-Raising Homestead Act, is Bumpus v. United States, 325 F.2d 264 (10th Cir. 1963). The *Bumpus* case arose several years after the United States condemned certain land for the purpose of building a reservoir. In the declaration of taking, the United States took the surface estate but reserved to the original owner the subsurface estate, including "all

oil, gas and other minerals in and under said land, with full rights of ingress and egress for the purpose of exploration, development, production and removal of oil, gas and other minerals." After the reservoir was constructed, a successor-in-interest to the original owner entered the subject land for the purpose of mining and removing gravel located there. Bumpus claimed the right to remove the gravel, so long as her operation did not impair the operation of the reservoir. Bumpus based her right to enter and remove gravel on the ground that the reservation of oil, gas and "other minerals" included gravel. The United States objected to such entry and sought a writ of assistance. The United States, in *Bumpus*, taking a position contrary to the Government's position in the present case, claimed that the phrase "other minerals" did *not* include gravel.

The trial court in *Bumpus* held that gravel was *not* a mineral reserved to the landowner, reasoning that the gravel was so closely related to the surface that it should be considered a part of the surface estate. On appeal, we affirmed.

In *Bumpus*, unlike *Skeen*, this Court applied the rule of *ejusdem generis* and concluded that gravel was not included within a reservation of "oil, gas and other minerals." Although *Bumpus* did not involve a patent issued under the Stock-Raising Homestead Act of 1916, it nonetheless is supportive of our disposition of the present controversy.

The only other Tenth Circuit case drawn to our attention which relates to our present problem is United States v. 1,253.14 Acres of Land, 455 F.2d 1177 (10th Cir. 1972). In that case, the trial court was asked to construe a deed which reserved to the grantor a one-half interest "in all minerals, including oil and gas."

The question presented was whether such reservation included gravel. The trial court found the reservation to be ambiguous, sought extrinsic evidence, and, because the grantee failed to meet his burden of proof, held that gravel was a reserved mineral. This Court affirmed. That case, however, does not, in our view, dictate a similar result in the instant case.

United States v. Union Oil Co., 549 F.2d 1271 (9th Cir. 1977), merits comment. That case, like the instant case, and *Skeen*, involved a patent issued under the Stock-Raising Homestead Act. The question there involved was whether the reservation of "coal and other materials" included geothermal steam. As above mentioned, the Ninth Circuit in that case reviewed, in depth, the legislative intent behind the Act, and concluded that the patentee received title to all rights in the patented land except those reserved to the United States. 549 F.2d at 1273-79. As concerns the scope of the reservation, the Ninth Circuit found that Congress intended to provide homesteaders with a portion of the public domain sufficient to enable them to support their families by raising livestock, but, at the same time, sought to retain governmental control of "unrelated subsurface resources, particularly energy sources, for separate disposition."

Based upon its understanding of congressional intent, the Ninth Circuit in *Union Oil* held that geothermal steam came within the mineral reservation of the Stock-Raising Homestead Act patent. We are in general accord with the Ninth Circuit's analysis of the legislative history of the Act, but we do not believe that such requires a holding that ordinary gravel is included in the mineral reservation. To us, there is a vast difference between geothermal steam and

gravel. Gravel is certainly not an unrelated subsurface energy resource.

Illustrative state court cases which are in accord with our holding in the instant case are State *ex rel.* State Highway Comm'n v. Trujillo, 487 P.2d 122 (S. Ct., N.M. 1971) and State Land Bd. v. State Dep't of Fish & Game, 408 P.2d 707 (S. Ct., Utah 1965).

Trujillo involved a patent issued pursuant to the Stock-Raising Homestead Act of 1916, and the question was, as here, whether gravel came within the reservation of "all coal and other minerals." [6] The New Mexico Supreme Court held that gravel was not included within the mineral reservation. We recognize that in so holding the New Mexico Supreme Court disapproved certain language appearing in Skeen v. Lynch, 48 F.2d 1044 (10th Cir. 1931). Specifically, the *Trujillo* court disagreed with the statement in *Skeen* that, in enacting the Stock-Raising Homestead Act, Congress intended to grant a surface estate and reserve to the United States all of the mineral estate. In our view the New Mexico court's disagreement with *Skeen* was not essential to the result reached in *Trujillo.* In any event, as above stated, we believe that the result which we have reached in the instant case is not at odds with *Skeen.*

The Utah case above mentioned, *State Land Bd.* v. *State Dep't of Fish & Game,* involved a conveyance from the State of Utah, which reserved to the state "all coal and other minerals." The question there posed was whether gravel was included within such a reservation. The Utah Supreme Court held that

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[6] So far as we are advised, *Trujillo,* and the instant case, are the only reported cases specifically addressing the question of whether gravel is a reserved mineral under a patent issued pursuant to the Stock-Raising Homestead Act of 1916.

gravel was not a reserved mineral. In thus holding, the Utah court made the following comment, which is pertinent to the present controversy:

> It is to be conceded that in its broadest sense the term "minerals" would include sand and gravel. In fact under the common cliche that everything is either "animal, vegetable or mineral" the term would include almost all material substances of the earth, its waters, and even the air we breathe. But a reflection upon the semantics of words reveals how unsure and varied are the possibilities of their meanings when considered in the abstract; and that in order to divine the true meaning in any given usage it is necessary to look to the context. Further, with respect to the meaning of statutes, it is appropriate to look to the intended purpose and to the means of accomplishing it by the proper application of the language used.
>
> It is advisable to first focus attention upon the subject of the statutory provision, which is "coal and other minerals." Under the well known rules of statutory construction known as ejusdem generis (of the same kind), and noscitur a sociis (know from its associates), the "other minerals" should be understood as something of the same general character as coal or minerals which are usually the subject of prospecting and mining, that is, something more valuable than the land in which they are contained and which are for that reason sought after and extracted from the land by mining, quarrying, or other special means for removal. . . .

> Sand and gravel are among the most widely occurring materials in the earth's surface and in fact it is composed almost entirely of them in vast areas. This includes much of the terrain of our Rocky Mountain region in which the land in question is situated. If the statute were so constructed as to reserve to the grantor these ordinary materials of the earth's surface, the effect in many instances would be to completely nullify the grant, which does not comport with reason.

All things considered, we believe that it was the intent of Congress that gravel *not* be deemed a reserved mineral in a patent issued pursuant to the Stock-Raising Homestead Act of 1916. Our conclusion finds support from the authorities above cited. In our view, the gravel lying under and upon appellant's land is so closely related to the surface estate, that it is part and parcel of it. We assume that ordinary rocks and stones are not minerals within the meaning of the patent's mineral reservation. If such common substances were considered to be included within the mineral reservation, then under all the many patents issued pursuant to the Stock-Raising Homestead Act, the patentees would own only the dirt, and little or nothing more. Such would be at odds with the nature of the terrain in the Rocky Mountain region, where rocks abound. And if ordinary rocks are not reserved minerals, it follows that gravel, a form of fragmented rock, also is not a reserved mineral.

Judgment reversed, and cause remanded with directions that the trial court vacate and set aside the decision of the IBLA and remand the matter with direction to dismiss the trespass notice served on Western Nuclear.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C78-129K

WESTERN NUCLEAR, INC., a Delaware corporation, authorized and doing business in the State of Wyoming, PLAINTIFF

vs.

CECIL ANDRUS, Secretary of the United States Department of the Interior, and the United States of America, DEFENDANTS

and

WYOMING STOCK GROWERS ASSOCIATION, JOHN ORR and the ASSOCIATED GENERAL CONTRACTORS OF WYOMING, INTERVENORS

Filed Aug. 27, 1979

MEMORANDUM OPINION

KERR, District Judge

August 27, 1979.

This case presents the question of whether gravel is a mineral. It is a dispute between Western Nuclear, a mining company, and the Interior Department (BLM) over the ownership of certain gravel deposits. The facts are not in dispute.

Western Nuclear has been located in Jeffrey City, Wyoming since the early 50's when uranium was first discovered on Green Mountain. Exploration in the

area has been going on for more than 10 years. After Western Nuclear had done initial exploration and location of the ore bodies, it began sinking a shaft in September 1975.

To keep the sides of the shaft from caving in, the company has been using concrete to shore the shaft. To date, the shaft is about 1500 feet deep. Western Nuclear's contractor hauled gravel from Lander and Casper to use in the concrete that was mixed in Jeffrey City.

This method of concrete production was very expensive so Western Nuclear began looking for a local source of material. In March 1975 they had bought a piece of property (the subject land) from Johnson-Redland which had an old gravel pit located thereon.

The original conveyance of the subject land was by patent (#914013) in 1926 pursuant to the Stock-Raising Homestead Act (1916). The patent contained the following reservation:

> Excepting and reserving however, to the United States all the coal and other minerals in the land so entered and patented together with the right to prospect for, mine, and remove the same pursuant to the provisions and limitations of the Act of December 29, 1916 . . . 39 STAT 862.

Western Nuclear has taken some 43,000 cubic yards of gravel from the site. The majority of it was used for black-topping streets and pouring sidewalks in Jeffrey City.

Prior to removing the gravel, Western Nuclear made application to the Wyoming Department of Environmental Quality (DEQ) to obtain a permit for the development of a gravel pit.

The Wyoming DEQ informed the BLM of the pending application and granted the permit. When

the permit was granted, Western Nuclear dug certain quantities of gravel from that pit. On November 3, 1975 Western Nuclear was served with a Notice of Trespass. The notice alleged a violation of the Materials Act of 1947 and the Common Varieties Act of 1955.

The finding of involuntary trespass by the Wyoming office of the BLM was appealed to the IBLA. The decision of the Wyoming BLM was upheld in a May 22, 1978 decision, 35 IBLA 146.

Western Nuclear was assessed damages of approximately $13,000 for the gravel taken.

Plaintiff argues on review that (1) BLM and the Interior Department lack jurisdiction over the land in question. From a study of the cases, this argument lacks merit. (2) The mineral reservation did not include ordinary gravel. (3) The amount assessed as damages is inappropriate and not in conformance with Wyoming law. The BLM did not take into account the cost of recovering the gravel.

Issue: Does the Stock-Raising Homestead Act's reservation "all the coal and other minerals" include gravel?

Before the mineral reservation is examined more closely, the general rules of statutory construction must be considered: (1) Patent mineral reservations are construed according to the intent of Congress at the time of enactment and under the circumstances then present. Moor v. County of Alameda, 411 U.S. 693, 709 (1973); U.S. v. Stewart, 311 U.S. 60, 69 (1940).

Legislative intent is sought in the history of the legislation as recorded in the legislative record, the committee report, statements by sponsors, floor debates, as well as the condition of the country at the

time and the purpose of Congress. Winona & St. Peter R.R. v. Barney, 113 U.S. 618, 625 (1885); U.S. v. Union Pac. R.R. Co., 230 F.2d 690 (10th Cir. 1956), rev. on other grounds 353 U.S. 112 (1957).

(2) Public legislation is construed broadly in favor of the government which made the grant; no rights pass by implication. U.S. v. Union Pac. R.R. Co., 353 U.S. 112 (1957); Andrus v. Charlestone Stone Productions Co., 436 U.S. 604, 617 (1978).

The Stock-Raising Homestead Act (SRHA) of Dec. 29, 1916, 43 U.S.C. 291-301 (1970), was enacted to "restore and promote the livestock and meat-producing capacity of the semi-arid states and . . . to furnish homes to landless and homeless citizens of our country." Stock-Raising land was classified as "lands, the surface of which is . . . chiefly valuable for grazing and raising forage crops, do not contain merchantable timber, and not susceptible to irrigation from any known source of water supply, and are of such a character that 640 acres are reasonably required for the support of a family". 43 U.S.C. 292 (1970).

Following entry and compliance with the requirements of the statute, the entryman became entitled to a patent subject to a reservation in the U.S. of the "coal and other minerals". The SRHA provided that the reserved minerals would be disposed of under the coal and mineral land laws in effect at the time of disposal. The SRHA gives any qualified person the right "at all times" to enter into patented surfaces to prospect for minerals. Under one statutory alternative, 43 U.S.C. 299, it is not necessary for the prospector to obtain the surface owner's consent, he can post a bond sufficient to cover the damage to permanent improvements. Otherwise, he obtains consent and pays for the actual damage to the permanent

improvements. Congress subsequently expanded the Act of 1916 to include damages caused by a prospector's strip or open-pit mining to the value of the land for grazing by Act of June 21, 1949, 30 U.S.C. 54 (1970) and Act of June 17, 1949, 30 U.S.C. 54 (1970). Congress probably intended to encourage prospecting under this Act by omitting the surface owner's consent to such entries. 1 American Law of Mining Sec. 3.50.

Historically, the severance of the surface from the mineral estate can be traced to English Common Law by which the Crown retained the gold and silver from grants of the land. The Continental Congress in America followed suit by reserving a ⅓ interest in all gold, silver, lead and copper mined on the public lands opened to settlement under the Land Ordinance of 1785. This continued in a variety of forms until 1846 when the pre-emption and homestead acts allowed the minerals to pass with patents to the land. The settlement act attempted to exclude known mineral lands from agricultural entry and patent. Because of unscientific methods, classification of mineral land was a failure and vast tracts of mineral lands in the West had passed to private owners by 1900.

Congress would not act to prevent this loss so President Theodore Roosevelt became involved. He withdrew large areas of public land thought to be valuable for coal from all forms of entry. In 1906 and again in 1907, President Roosevelt pointed out that some public lands were useful for both agriculture and production of subsurface fuels, and that these two uses could best be served by separate disposition of the right to utilize the same land for each purpose. The President called the attention of Congress "to the importance of conserving the supplies of mineral fuels still belonging to the Government".

41 Cong. Rec. 2806 (1907). To that end, the President recommended "enactment of such legislation as would provide for title to and development of the surface land as separate and distinct from the right to the underlying mineral fuels in regions where these may occur . . ."

In 1909 the Secretary of the Interior returned to the same theme, arguing that "inducements for much of the crime and fraud . . . can be prevented by separating the right to mine from the title to the soil. The surface would thereby be open to entry under other laws according to its character and subject to the right to extract coal. . ." The Secretary made the same suggestion with respect to "oil and gas fields in the public domain".

The Coal Lands Act of 1909 and 1910 were the first two of the agricultural entry statutes. These were followed by the Agricultural Entry Act of 1914 which allowed agricultural entry onto lands withdrawn as valuable for phosphate, nitrate, potash, oil, gas or asphaltic minerals. In order to provide more acreage to ranchers in the arid Western lands, the Stock-Raising Homestead Act (SRHA) of 1916 was also adopted. It increased the homestead allotment from 320 acres to 640 acres. It eliminated the problem of classifying lands entered under its provisions as agricultural or mineral. The 1916 Act simply provided for a qualified patent which reserved to the U.S. all minerals in lands homesteaded for stock-raising purposes.

The effectiveness of these Acts was ended by the Taylor Grazing Act of 1934, which ended homesteading on the public domain. Uncontrolled grazing had been seriously damaging the public range.

The immensity of the problem resulting from separation of estates is apparent in the amount of sur-

face acreage affected. As of 1972, entries under the SRHA affected 70,362,406 acres of land. (BLM, U.S. Department of Interior, Public Land Statistics 58 [1972]). In Wyoming, approximately 12% of the state is subject to federal reservations of minerals under private lands, most under the SRHA.

The reports of the committee and the floor debates on the SRHA reveal that the intent of Congress was to follow the recommendations of the President and the Secretary of the Interior, that is to sever the two estates:

The House report states:

> It appeared to your committee that many hundreds of thousands of acres of the lands of the character designated under this bill contain coal and other minerals, the surface of which is valuable for stock-raising purposes. The purpose of (the reservation) is to limit the operation of this bill strictly to the surface of the lands described and to reserve to the United States the ownership and right to dispose of all minerals underlying the surface thereof. The section also provides a method for the joint use of the surface of the land by the entryman of the surface thereof and the person who shall acquire from the United States the right to prospect, enter, acquire and remove all minerals that may underlie such lands, this method to be under the direction of the Secretary of the Interior under such rules and regulations as he may prescribe. H.R. Rep. No. 35, 64th Cong., 1st Sess. 18 (1916)

The comments of the Interior Department were included in the report of the House Committee on the Public Lands:

> "The farmer-stockman is not seeking and does not desire the minerals, his experience and efforts being in the line of stock raising and farming, which operations can be carried on without being materially interfered with by the reservation of minerals and the prospecting for and removal of same from the land." Ibid, 5.

In floor debates, various representatives emphasized that the grant was limited to the surface estate and all minerals were retained by the United States:

> "We believe it would cover every kind of mineral. All kinds of minerals are reserved." Congressman Ferris, manager of the bill, 53 Cong. Rec. 1171 (1916).

Congressman Mondell opposed the SRHA's general mineral reservation because it restricted the patentee's estate more than earlier statutes and stated for the Congressional Record:

> ". . . The fact should be emphasized that the bill establishes a new method and theory with regard to minerals in the land legislation in our country. It reverts back to the ancient doctrine of the ownership of the mineral by the King or the Crown and reserves specifically everything that is mineral in all land entered. It was, it was claimed, necessary to accept a provision of that kind in order to secure the larger acreage . . . My own opinion is that the policy is not wise and that in the long run it will be found to be infinitely more harmful than beneficial or useful or helpful to anyone, either the individual or the public generally. When one takes into consideration the wide range of substances classed as mineral, the

> actual ownership under a complete mineral reservation becomes a doubtful question." 54 Cong. Rec. 687 (1916).

At the time of enactment, the term mineral did not have a definite meaning. Several contemporaneous authorities on mining law and minerals had the following definitions of the term. Lindley on Mines, Sec. 98, (1914 rev. ed.), lays down certain rules for determining the mineral or nonmineral character of lands as follows:

> The mineral character of land is established when shown to have upon it, or within it, such a substance as (a) is recognized as mineral according to its chemical composition by the standard authorities on the subject; or (b) is classified as a mineral product in trade or commerce; or (c) such a substance (other than the mere surface which may be used for agricultural purposes) as possesses economic value for use in trade, manufacture, the sciences or the mechanical or ornamental arts.
>
> And it is demonstrated that such substance exists therein or thereon in such quantities as render the land more valuable for the purpose of removing and marketing the substance than for any other purpose, and the removing and marketing of which will yield a profit; or it is established that such substance exists in the lands in such quantities as would justify a prudent man in expending labor and capital in the effort to obtain it.

The above definition was cited in an early 8th Circuit decision by Judge Kenyon, Dunbar Lime Co. v. Utah-Idaho Sugar Co., 17 F.2d 351 (1926).

Lindley further stated:

> The real test [of what is a mineral] seems to be the character of the deposit as occurring independently of the mere soil, valuable in itself for commercial purposes, that is near enough to a market to have a value. Sec. 93.

Lindley cited English and American authorities for the proposition that gravel is a mineral. He added that according to the great weight of authority limestone and gravel type deposits would not be considered as reserved in a deed excepting "minerals", if they constituted the land or a principal part of it. But in the same treatise, Sec. 424, he strongly criticized the Land Department's decision of 1910, Zimmerman v. Brunson, infra, relied on by plaintiff herein, ruling that gravel was not a mineral. Lindley states:

> A similar disagreement exists between the courts and the land department as to sand and gravel . . . The courts follow a consistent uniformly recognized principle which establishes the test of profit marketability. The Land Department follows this principle as a general rule, but disregards it in the case of common place substances such as ordinary clay, sand and gravel. We submit deferentially that the common place quality of a substance is not sufficient warrant for departing from the general rule.

Another authority defined "mineral" as:

> ". . . any constituent of the earth's crust, more especially an inorganic body, occurring in nature, homogenous and having a definite chemical formula, and having certain distinguishing characteristics and which is capable of being got from

the earth for the purpose of profit. Ricketts on Mines, Sec. 99 (1911).

Gravel is not capable of being expressed by one chemical formula because it does not have one definite chemical composition.

Congress, in enacting the SRHA, relied on administrative expertise and probably was cognizant of the decisions of the Interior Department.

Under the earliest decisions of the Land Department, it appears that gypsum, limestone, marble, alluvial deposits, gravelly soil and granite were considered as minerals within the purview of the Mining Act of 1872. W. H. Hooper, 1 L.D. 560 (1881); H. P. Bennet, Jr., 3 L.D. 116 (1884). But the Land Department also denied some claims that were based on stone deposits useful for building purposes only. Conlin v. Kelly, 12 L.D. 1 (1891). It would recognize claims founded on stone deposits that could be used for special purposes, monuments, ornamentation, etc.

The Interior decision on the subject, in force at the time of the enactment of the SRHA, was the case of Zimmerman v. Brunson, 39 L.D. 310 (1910). The Interior Department ruled that deposits of gravel and sand suitable for mixing with cement for concrete construction, but having no special value, do not make the land where they are found mineral land as defined by the mining laws. This is true notwithstanding that the land may be more valuable because of these deposits than for agricultural purposes. The Secretary's decision was that the sand and gravel were not minerals where (1) sand and gravel were not recognized by standard authorities as minerals; (2) the sole use of the materials was for general building purposes; and (3) the chief value of the gravel was its proximity to a city.

In 1929 the decision in Layman v. Ellis, 52 L.D. 714, specifically overruled Zimmerman and ruled that gravel was a mineral locatable under the mineral laws. The Assistant Secretary cited the increased value of gravel from 1909 to 1929 and concluded by stating that "There can be no question that gravel deposits are definitely classified as a mineral product in trade and commerce and have a pronounced and widespread economic value because of the demand therefor in trade, manufacture, or in the mechanical arts". p. 718.

The Secretary said that (1) gravel is definitely classified as a mineral product in trade or commerce. (See T.D. 25627, 8 Treas. Dec. 356 (1904), "Gravel is certainly a mineral substance in the ordinary meaning of the term 'mineral' . . ."); (2) whether a given substance is locatable is not resolved solely by the chemical composition test; and (3) while the distinguishing special characteristics are purely physical, small bulk, rounded surfaces, hardness, these characteristics render gravel readily distinguishable from other rocks and rock fragments.

Layman v. Ellis was reaffirmed in a 1933 opinion of the Acting Solicitor, "Taking of Sand and Gravel from Public Lands for Federal Aid Highways", 54 L.D. 294.

The decision in the present case, Western Nuclear, 35 IBLA 146 (1978), relied on the next Interior Department case in the subject area, U.S. v. Isbell Construction Co., 4 IBLA 205 (1971). In this case, the Interior Department was called upon to decide (1) whether common sand and gravel are "minerals" reserved to the U. S. in a patent granted under the Taylor Grazing Act, 43 U.S.C. Sec. 315g (1970) and (2) whether deposits of sand and gravel which comprise all or substantially all of the lands conveyed and are

indistinguishable from the soil itself are within the ambit of the reservation.

The sand and gravel in this case comprised practically all of the surface and subsurface to depths of 20 to 600 feet. The surface estate had been patented to the State of Arizona with a reservation of "all the minerals" to the United States.

The IBLA collected the many state cases, which hold that grantors cannot be deemed to have reserved those minerals which comprise the surface, without clear and express language of reservation. The Board also noted that valuable deposits of sand and gravel had for many years been regarded as minerals subject to location under the mining laws and held the Multiple Surface Use Act of 1955 did not affect the mineral character of such materials.

The Board distinguished the above cases because the Taylor Act required compensation to the surface owner for damage to the land. The Board therefore held that a reservation of minerals to the United States reserved valuable deposits of common sand and gravel.

It allowed no exception to this rule where those minerals comprise all or substantially all of the land in question. They followed the majority rule of construction of mineral reservation by holding that the reservation should be construed as severing the mineral estate from the surface estate. This rule of construction would sever from the surface all mineral substances which can be taken from the soil and have separate value. Since there is the damage provision, the Board saw no reason to impose an exception for the protection of the surface owner.

It should be noted at this point that the BLM has never followed these decisions with consistency. It appears that it was not until 1975 that the Wyoming

State office of the BLM attempted to be paid for the removal of gravel from patented surface estates. Until that time, it was the practice of the Wyoming Highway Department, construction companies, and the ranchers owning the surface estate to treat the gravel as part of the surface estate, the gravel being sold or used by the rancher with the approval of the BLM.

Before considering the court decisions in this area, it is important to analyze the significance of the Materials Act of 1955, 30 U.S.C. 611 (1970). Essentially, this act stated that "common varieties" of sand, stone, gravel, pumice, pumicite, and cinders are not to be deemed "a valuable mineral deposit within the mining laws of the United States so as to give effective validity to any claims hereafter located . . ." It provided for a new method of disposal for these common varieties. It must be emphasized that this does not legislatively end the dispute over gravel as a mineral since reserved minerals are not necessarily the same as locatable minerals.

This subject has created difficulty for the courts considering it. There is no clear consensus in the courts on the question of gravel as a mineral.

Most state court cases on the subject have construed private mineral reservations rather than U.S. mineral reservations. These cases vary but in the main hold that a mineral reservation would not include sand or gravel if it comprised the surface unless there was a specific intent to do so. (95 ALR2d 843 [1964]).

The most recent state court decision on the subject addressed the precise question now under consideration. It was decided by the New Mexico Supreme Court, New Mexico v. Trujillo, 487 P.2d 122 (1971), which held that the reservation under the SRHA did

not reserve gravel which had no rare or exceptional character. This court declined to follow the 10th Circuit analysis of the effect of the SRHA's mineral reservation, that is a severance of the two estates. Skeen v. Lynch, 48 F.2d 1044 (10th Cir. 1931). Also, the state court considered gravel to be more akin to soil and thus part of the surface rather than part of the mineral estate.

Decisions in the federal district courts are not many but they also vary in their treatment of the subject.

Two Alaskan cases were decided in the 1950's. The first was Anchorage Sand & Gravel Co. v. Schubert, 114 F.Supp. 436 (Alaska 1953), which held that sand and gravel were not "valuable mineral deposits" under the mining laws of the United States. This case was affirmed on other grounds by the 9th Circuit. Superior Sand & Gravel Mining Co. v. Territory of Alaska, 224 F.2d 623 (1955). In U.S. v. Schaub, 163 F.Supp. 875 (Alaska 1958), the court held that the deposits of sand and gravel supported a mineral entry.

In a recent decision by the United States District Court, Amoco v. Guild Trust (Wyo. 1978), this court followed the analysis of the 10th Circuit in Skeen v. Lynch, supra, stating that the railroad mineral reservation, "coal and other minerals", severed from the surface estate the mineral estate.

The U. S. Supreme Court has not considered the subject matter since 1903. In Northern Pacific Railway v. Soderberg, 188 U.S. 526 (1903), the court considered whether lands chiefly valuable for granite quarries were mineral lands under the Railway Act of 1869. The court ruled that these lands were mineral lands. Beginning at p. 530, the court stated:

> The word "mineral" is used in so many senses, dependent upon the context, that the ordinary

definitions of the dictionary throw but little light upon its signification in a given case. Thus the scientific division of all matter into the animal, vegetable, or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom . . . In construing this grant we must not overlook the general principle announced in many cases in this Court, that grants for the sovereign should receive a strict construction—a construction which shall support the claim of the government rather than that of the individual. The rulings of the Land Department to which we are to look for the contemporaneous construction of these statutes, have been subject to very little fluctuation, and almost uniformly . . . have lent strong support to the theory of the patentee, that the words "valuable mineral deposits" should be construed as including all lands chiefly valuable for other than agricultural purposes, and particularly as including non-metallic substances, among which are held to be alum, asphaltum, borax, guano, diamonds, gypsum, resin, marble, mica, slate, amber, petroleum, limestone, building stone and coal . . . the overwhelming weight of authority to the effect that mineral lands include not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character which are useful in the arts or valuable for purposes of manufacture. (This list was quoted with approval by the 8th Circuit, Judge Sanborn, in Webb v. American Asphaltum Mining Co., 157 Fed. 203, 205 [1907]).

The determinative cases have been decided by the U.S. Court of Appeal. In Skeen v. Lynch, 48 F.2d 1044 (10th Cir. 1931), Justice Lewis determined the interpretation of the mineral reservation in the Stock-Raising Homestead Act. The court ruled that "The legislative history of the Stock-Raising Homestead Act when it was reported for passage . . . leaves us no room to doubt that it was the purpose of Congress in the use of the phrase 'all coal and other minerals' to segregate the two estates, the surface for stock raising and agricultural purposes from the mineral estate and to grant the former to entrymen and to reserve all of the latter to the United States."

This court refused to use the rule of ejusdem generis, "of the same kind or species", in interpreting the mineral reservation. In Bumpus v. U.S., 325 F.2d 264 (10th Cir. 1963), Judge Phillips used this rule of construction to decide the ownership of gravel under a Federal Declaration of Taking which reserved "all oil, gas and other minerals" to subsurface estate holders.

The court stated that ". . . 'mineral' is a word of general language and not per se a term of art. It does not have a definite meaning. It is used in many senses. It is not capable of a definition of universal application, but is susceptible to limitation or expansion according to the intention with which it is used in the particular instrument or statute . . . The word, if broadly construed, would include gravel."

The court then went on to hold that under the ejusdem generis rule of construction, the terms "oil and gas" limited the content of the word "minerals" to only those minerals "like" oil and gas. Therefore, gravel was not included.

In U.S. v. Harris, 115 F.2d 343 (5th Cir. 1940), the court ruled that gravel was a mineral. In Cumberland Mineral Co. v. U.S., 513 F.2d 1399 (1975), the Court of Claims ruled that a private reservation of oil and gas and other minerals did not reserve clay and shale because the loss of the surface estate would result and would therefore be unreasonable.

The most recent case from the Court of Appeals interpreting the SRHA is that of U.S. v. Union Oil Co., 549 F.2d 1271 (9th Cir. 1977).

The issue before the court was whether the mineral reservation in the SRHA reserves to the United States the geothermal resources under the patented lands. Following an exhaustive analysis of the legislative intent, the court concluded:

> The Act's background, language and legislative history offer convincing evidence that Congress' general purpose was to transfer to private ownership tracts of semi-arid public land capable of being developed by homesteaders into self-sufficient agricultural units engaged in stock raising and forage farming, but to retain subsurface resources, particularly mineral fuels, in public ownership and conservation and subsequent orderly disposition in the public interest. p. 1274.

As stated earlier, the rule of construction to be applied in construing United States government mineral reservations is to decide in favor of the government if there is a question. The legislative intent is clear and has been determined by the 9th and 10th Circuits to be an intent to sever the surface estate from the mineral estate.

The cases cited illustrate that the term "mineral" does not have a closed, precise meaning. As a sub-

stance is found to be valuable, it has been included in the general mineral reservation of the government. (Oil, gas, helium, geothermal steam). This is despite the fact that at the time of the enactment of the Act the term "mineral" may not have included these particular substances.

The intent of the SHRA was to sever the two estates, the surface for stock raising and the mineral estate for mineral development. The mineral estate is a flexible entity which expands with the development of the arts and sciences to include more minerals. This is especially evident in the Union Oil case, supra, where what is essentially heated water has been ruled to be part of the mineral estate reserved in the SRHA of 1916. And, as the 9th Circuit noted, this was at a time when the use of geothermal steam as a fuel source was not widely thought of.

In conclusion, it is evident from the legislative history, contemporaneous definitions and court decisions that the mineral reservation in the SRHA of 1916 is broad enough to include gravel as a mineral. As such, the Court holds that gravel is reserved to the United States.

An Order will be entered affirming the decision of the Interior Board of Land Appeals.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C78-129K

WESTERN NUCLEAR, INC., a Delaware corporation, authorized and doing business in the State of Wyoming, PLAINTIFF

vs.

CECIL ANDRUS, Secretary of the United States Department of the Interior, and the United States of America, DEFENDANTS

and

WYOMING STOCK GROWERS ASSOCIATION, JOHN ORR and the ASSOCIATED GENERAL CONTRACTORS OF WYOMING, INTERVENORS

ORDER AFFIRMING DECISION OF THE INTERIOR BOARD OF LAND APPEALS

The above-entitled matter coming on regularly for hearing before the Court, and the Court having heard the arguments of counsel in support of affirming the decision of the Interior Board of Land Appeals and in opposition thereto, and the Court having taken said matter under advisement and having considered the entire record, memoranda briefs and all other matters pertinent hereto, and having prepared and filed herein its Memorandum Opinion, and being fully advised in the premises; it is

ORDERED that said decision of the Interior Board of Land Appeals be and the same is hereby affirmed; it is

FURTHER ORDERED that the element of damages shall be determined by the collaboration of the Wyoming State Office of the Bureau of Land Management and the landowners, Western Nuclear, Inc.

Dated this 27th day of August, 1979.

/s/ Ewing T. Kerr
U. S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C78-129K

WESTERN NUCLEAR, INC., a Delaware Corporation, authorized and doing business in the State of Wyoming, PLAINTIFF

vs.

CECIL ANDRUS, Secretary of the United States Department of the Interior, and the United States of America, DEFENDANTS

and

WYOMING STOCK GROWERS ASSOCIATION, JOHN ORR and the ASSOCIATED GENERAL CONTRACTORS OF WYOMING, INTERVENORS

Filed Nov. 14, 1979

ORDER RULING ON MOTIONS

The above-entitled matter having come before the Court upon Wyoming Stock Growers Association's Motion for Summary Judgment and Motion to Alter Or Amend "Order Appealing Decision of the Interior Board of Land Appeals" and For New Trial, and Western Nuclear, Inc.'s Motion to Alter or Amend Judgment; and the Court having heard the arguments of counsel in support of said motions and in opposition thereto, and being fully advised in the premises; it is

ORDERED that the Motion for Summary Judgment filed on behalf of the Wyoming Stock Growers Association be and the same is hereby denied; it is

FURTHER ORDERED that the Motion to Alter or Amend "Order Appealing Decision of the Interior Board of Land Appeals" and for New Trial filed for and on behalf of the Wyoming Stock Growers Association be and the same is hereby denied; it is

FURTHER ORDERED that the Motion to Alter or Amend Judgment filed for and on behalf of Western Nuclear, Inc. be and the same is hereby denied.

Dated this 14th day of November, 1979.

/s/ Ewing T. Kerr
U. S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C78-129K

[Filed Nov. 14, 1979]

WESTERN NUCLEAR, INC., a Delaware Corporation, authorized and doing business in the State of Wyoming, PLAINTIFF

vs.

CECIL ANDRUS, Secretary of the United States Department of the Interior, and the United States of America, DEFENDANTS

and

WYOMING STOCK GROWERS ASSOCIATION, JOHN ORR and the ASSOCIATED GENERAL CONTRACTORS OF WYOMING, INTERVENORS

ORDER AMENDING ORDER AFFIRMING DECISION OF THE INTERIOR BOARD OF LAND APPEALS

The above-entitled parties having filed herein a stipulation as follows:

1. The Order Affirming Decision of the Interior Board of Land Appeals and Memorandum Opinion issued by the Court in this matter on August 27, 1979 address only the administrative record before the Interior Board of Land Appeals and the property rights of Western Nuclear, Inc.

2. No findings were made concerning evidence submitted by Intervenors, John Orr, Associated General Contractors of Wyoming or the Wyoming Stock Growers Association.

3. Intervenors, John Orr, Associated General Contractors of Wyoming, and Wyoming Stock Growers Association are not barred by said Order from raising, in the future, issues of fact and law concerning their property rights in sand and gravel patented pursuant to the Stock Raising Homestead Act and the Court may modify its Order to so state. The decision shall not be res judicata of the individual intervenors' rights in other fact situations.

and the Court having considered said stipulation and being fully advised in the premises; it is

ORDERED that the Order entered on the 27th day of August, 1979 include the provisions of the aforesaid Stipulation; the Court confirms and approves said Stipulation and incorporates the same as a part of the Order Affirming Decision of the Interior Board of Land Appeals dated August 27, 1979.

Dated this 14th day of November, 1979.

/s/ Ewing T. Kerr
U.S. District Judge

APPENDIX C

[SEAL]

UNITED STATES DEPARTMENT
OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 Wilson Boulevard
Arlington, Virginia 22203

WESTERN NUCLEAR, INC.

IBLA 76-589 Decided May 22, 1978

Appeal from decision of the Wyoming State Office, Bureau of Land Management, holding appellant liable for trespass damages. WY-03-4025.

Affirmed as modified.

1. Mineral Lands: Mineral Reservation—Patents of Public Lands: Reservations—Statutory Construction: Generally — Stock-Raising Homesteads

   As to gravel, interpretations of the mineral reservation in patents issued by the United States under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), must be consistent with the established rule that land grants are to be construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it.

2. Mineral Lands: Mineral Reservation—Patents of Public Lands: Reservations—Statutory Con-

struction: Generally—Stock-Raising Homesteads

In determining whether gravel is included in a mineral reservation in a patent issued under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), the interpretation of the reservation must take into account the intended use for which the land was conveyed and those uses which the Government intended to reserve.

3. Mineral Lands: Mineral Reservation—Patents of Public Lands: Reservations—Stock-Raising Homesteads

A patent of land under the Stock-Raising Homestead Act, 43 U.S.C. § 291 *et seq.* (1970), was not generally intended to give the grantee the right to use the land for mineral development and mineral development was to proceed only under the mineral laws.

4. Mineral Lands: Mineral Reservation—Patents of Public Lands: Reservations—Statutory Construction: Generally—Stock-Raising Homesteads—Words and Phrases

"*Ejusdem generis.*" The *ejusdem generis* rule of construction may not be invoked to exclude gravel from the scope of a reservation of "all the coal and other minerals" in patents issued under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), because this rule of construction can only be effectively applied where there is a series of specific terms which define a class so that one may construe a general term by reference to that class.

5. Mineral Lands: Mineral Reservation—Patents of Public Lands: Reservations—Public Lands: Administration—Stock-Raising Homesteads—Trespass: Generally

   Sec. 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), contemplates the Department of the Interior retaining continuing jurisdiction and administration of mineral deposits reserved by that Act.

6. Mineral Lands: Mineral Reservation—Patents of Public Lands: Reservations—Public Lands: Administration—Stock-Raising Homesteads—Surface Resources Act: Applicability—Trespass: Generally—Words and Phrases

   "*Public lands.*" Under 43 CFR 9239.0-7 which defines a trespass, the term "public lands" includes mineral deposits reserved under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970).

7. Mineral Lands: Mineral Reservation—Patents of Public Lands: Reservations—Stock-Raising Homesteads—Surface Resources Act: Generally

   The declaration in the Surface Resources Act, 30 U.S.C. § 611 (1970), that no deposit of common varieties of gravel shall be deemed a valuable mineral deposit within the meaning of the mining laws, was not intended to operate as a conveyance, to holders of patents, of any minerals reserved under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970).

8. Mineral Lands: Mineral Reservation—Patents of Public Lands: Reservations—Stock-Raising Homesteads

Gravel in a valuable deposit is a mineral reserved to the United States in patents issued under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970).

9. Appraisals—Hearings—Mineral Lands: Generally—Surface Resources Act: Hearings—Trespass: Measure of Damages

When the Bureau of Land Management has appraised the damages for a mineral trespass under 43 CFR Part 9230, a hearing will not be ordered and an appraisal will not be disturbed in the absence of an offer of specific substantial evidence that the determination is incorrect.

APPEARANCES: Harley W. Shaver, Esq., Canges & Shaver, Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GOSS

Western Nuclear, Inc., has appealed from the decision of the Wyoming State Office, Bureau of Land Management, in which the Bureau determined that appellant had committed an unintentional trespass on federally owned minerals and held appellant liable for $13,000 in damages for gravel removed from the deposit. Appellant alleges it has also removed sand, but that material is not the subject of the trespass action. Appellant challenges both the fact of the reservation of the gravel and the amount of damages which were imposed.

The State Office cited appellant for trespass involving violation of the Materials Act of July 31, 1947 (61 Stat. 681), *as amended*, by the Surface Resources Act of July 23, 1955 (69 Stat. 368), 30 U.S.C. § 601

et seq. (1970). The latter act declared, *inter alia*, that "[n]o deposit of common varieties of * * * gravel * * * shall be deemed a valuable mineral deposit within the meaning of the mining laws * * *." 30 U.S.C. § 611 (1970).

The land on which the trespass had occurred was patented in 1926. The patent reserved to the United States "all the coal and other minerals in the lands so entered and patented together with the right to prospect for, mine, and remove the same pursuant to the provisions and limitations of the Act of December 29, 1916 (39 Stat. 862-865)," the Stock-Raising Homestead Act, 43 U.S.C. §§ 291-301 (1970).[1] The first issue is whether this reservation includes gravel.

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[1] These provisions and limitations are set forth at 43 U.S.C. § 299 (1970):

"All entries made and patents issued under the provisions of sections 291 to 301 of this title shall be subject to and contain a reservation to the United States of all the coal *and other minerals* in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal. Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by said sections, for the purposes of prospecting for coal *or other mineral therein*, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may reenter and occupy

The State Office appraisal report describes the property as follows:

> The deposit located on the property is an alluvial gravel with 6.4 acres of the 14 acre parcel

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so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior and to be filed with and approved by the officer designated by the Secretary of the Interior of the local land office of the district wherein the land is situate, subject to appeal to the Secretary of the Interior or such officer as he may designate: *Provided*, That all patents issued for the coal or other mineral deposits herein reserved shall contain appropriate notations declaring them to be subject to the provisions of sections 291 to 301 of this title with reference to the disposition, occupancy, and use of the land as permitted to an entryman under said sections." (Emphasis added.)

As to compensation for damage to grazing values, see *infra*.

For the subsequent legislative history of 43 U.S.C. §§ 291-98 (1970), see 43 U.S.C. § 315 *et seq.* (1970) and sec. 702 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2789. *Daniel A. Anderson*, 31 IBLA 162 (1977). The Federal Land Policy and Management Act provides that 43 U.S.C. §§ 291-98 are repealed.

> mined for gravel. * * * There are 6-12 inches of overburden on the site * * *. It is estimated that the deposit thickness will average 10 feet or more in thickness. In the nature of speculation, the deposit could cover up to 40 acres, however this report is restricted to the 6.4 acre area mined. * * *
>
> *Highest and Best Use*
>
> After investigating the area in and around Jeffrey City based on the site data analysis above it is adjudged that the highest and best use of the property is for a mineral material (gravel) site.
>
> The land was used for grazing before location of the pit and after rehabilitation will most likely be used as grazing land. However, during the time of operation of the pit its highest and most productive use is for a gravel site-mineral material site.

The above conclusion in the appraisal report is based on a technical report of T. W. Holland. Also a part of the appraisal report is a mineral report in which geologist William D. Holsheimer states:

> The gravel is overlain by a soil cover of fairly well developed loamy sand, some 12-18 inches in thickness. There is a relatively good vegetative cover, consisting mainly of sagebrush, and an understory of various native grasses.

Appellant argues that the mineral reservation issue is governed by the law in effect at the time the grant was made and points to the case of *Zimmerman* v. *Brunson*, 39 L.D. 310 (1910), in which the presence of sand and gravel was held not to make the land

mineral in character. Although appellant recognizes that this decision was overruled by *Layman* v. *Ellis*, 52 L.D. 714 (1929), it contends that sand and gravel were not considered minerals at the time the statute was passed.

In a brief unpublished opinion, the Department has indicated that sand and gravel are minerals reserved to the United States in patents issued under the Stock-Raising Homestead Act, even though such minerals are no longer subject to location under the mining laws. *Solicitor's Opinion*, M-36417 (February 15, 1957). This Board has also ruled that sand and gravel are reserved in patents issued under another statute, 43 U.S.C. § 315(g) (1970), which reserves "all minerals" to the United States. *United States* v. *Isbell Construction Co.*, 4 IBLA 205, 78 I.D. 385 (1971).[2] The arguments raised by appellant, however, have not been fully considered previously, and the reservation in the Stock-Raising Homestead Act has not previously been construed by the Board of Land Appeals.

[1] At the outset, it must be recognized that the appeal concerns construction of a mineral reservation in a patent issued by the United States, and interpretation must be consistent with "the established rule that land grants are to be construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." *United States* v. *Union Pacific R. Co.*, 353 U.S. 112,

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[2] The Stock-Raising Homestead Act differed originally from the statute construed in *Isbell Construction Co.*, *supra*, which statute provided from the date of its enactment for compensation for damage to the land as well as to improvements. 43 U.S.C. § 315g(d) (1970).

116 (1957). Under this rule, sand and gravel should be considered as included in a reservation of all minerals to the United States unless it is clear that they were conveyed by the patent under the statute. In *United States* v. *Union Oil Co. of California*, 549 F.2d 1271, 1273 n. 5 (9th Cir.), *cert. denied*, ——U.S.——, 98 S. Ct. 121 (1977), the Court cited *Union Pacific* and held that geothermal resources of previously unrecognized value were reserved under Stock-Raising Homestead patents. The *Union Oil* ruling at 1274 and 1277 is particularly applicable to the appeal herein:

> * * * The Act's background, language, and legislative history offer convincing evidence that Congress's general purpose was to transfer to private ownership tracts of semi-arid public land capable of being developed by homesteaders into self-sufficient agricultural units engaged in stock raising and forage farming, but to retain subsurface resources, particularly mineral fuels, in public ownership for conservation and subsequent orderly disposition in the public interest. The agricultural purpose indicates the nature of the grant Congress intended to provide homesteaders via the Act; the purpose of retaining government control over mineral fuel resources indicates the nature of reservations to the United States Congress intended to include in such grants.
>
> * * * * *
>
> * * * The report of the House Committee reproduces a letter from the Department of Interior endorsing the bill. The Department notes that "*all mineral*[*s*] *within the lands are re-*

served to the United States." H.R. Rep. No. 35, 64th Cong., 1st Sess. 5 (1916).

* * * * *

The floor debate is revealing. The bill drew opposition because of the large acreage to be given each patentee. *See, e.g.,* 52 Cong. Rec. 1808-09 (1915) (remarks of Rep. Stafford). In response, supporters emphasized the limited purpose and character of the grant. They pointed out that because of the public lands involved were semi-arid, an area of 640 acres was required to support the homesteader and his family by raising livestock. *E.g., id.* at 1807, 1811-12 (remarks of Reps. Fergusson, Martin and Lenroot). They also pointed out that the grant was limited to the surface estate, * * * and they emphasized in the strongest terms that all minerals were retained by the United States. [Emphasis added.]

The primary issue herein is whether gravel constitutes a "mineral" resource under the Stock-Raising Homestead Act. The Act and its legislative history support a broad interpretation of the scope of the mineral reservation. Although no reference to gravel appears in the statute or legislative history, we believe that holding gravel to be a reserved mineral is consistent with Congress' dual purpose in conveying land for stock-raising purposes and retaining the right to develop all minerals.

[2] The Stock-Raising Homestead Act was enacted to encourage further settlement on public land and increase the supply of livestock. It was recognized that vast unpopulated areas of the West were semi-

arid in character so that even 320 acres, the maximum entry under existing agricultural land laws, would not be sufficient to support a family. Although such land might not be suitable for farming, it was suitable for raising livestock, and the desire to see such land settled led to the consideration of legislation which evolved into the Stock-Raising Homestead Act. The Act provided for entry of 640 acres of land designated by the Department as stock-raising land, which was defined as

> * * * lands the surface of which is * * * chiefly valuable for grazing and raising forage crops, do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply, and are of such character that six hundred and forty acres are reasonably required for the support of a family * * *.

43 U.S.C. § 292 (1970). The acreage that could be entered was double the maximum entry under existing agricultural entry laws, and Congress perceived the need to ensure that mineral resources would not be conveyed under what was a form of agricultural disposal.

Before 1909, lands which were mineral in character were subject to disposal only under the mineral laws. *United States* v. *Sweet*, 245 U.S. 563, 567-72 (1918). Because such land was not subject to disposal under the agricultural land laws, a homestead entry on mineral land could be canceled after a mineral claimant had established the mineral character of the land in a contest proceeding. *See, e.g., Layman* v. *Ellis*, *supra*, in which a homestead entry was canceled to the extent that it included a sand and gravel deposit.

However, various statutes were enacted in 1909,[3] 1910,[4] and 1914[5] which permitted agricultural entries on lands valuable for specified minerals but which reserved such minerals to the United States. The mineral reservation provisions of the 1910 and 1914 Acts provided the models for the mineral reservation provision of the Stock-Raising Homestead Act, except that the Stock-Raising Homestead Act required a reservation of "all the coal and other minerals" rather than specifically mentioned minerals.

The Stock-Raising Homestead Act is predicated on the concept that land may be subject to multiple uses and that designation for one form of use should not preclude disposal for other possible uses. Thus, interpretation of a conveyance under the Act must take into account the intended use for which the land was conveyed and those uses which the Government intended to reserve. *United States* v. *Union Oil Co.*, *supra*; *see Skeen* v. *Lynch*, 48 F.2d 1044 (10th Cir. 1931).[6]

[3] The very name of the Act, and the requirement of designation of the land as stock-raising land ("land the surface of which is * * * chiefly valuable for grazing and raising forage crops * * *") prior to entry, underscore the limited purpose of the grant.

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[3] An Act for the protection of the surface rights of entrymen, 30 U.S.C. § 81 (1970), which provided for reservation of coal.

[4] An Act to provide for agricultural entries on coal lands. 30 U.S.C. §§ 83-85 (1970).

[5] An act to provide for agricultural entry of lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or ashpaltic materials. 30 U.S.C. §§ 121-123 (1970).

[6] In *Skeen*, *supra* at 1046, the Court stated:

United States v. *Union Oil Co. of California, supra* at 1277. The text of the mineral reservation provision makes clear that a patent of land for stock raising purposes was not to give the grantee the right to use the land for mineral development and that mineral development was only to proceed under mineral laws then in effect or those that may later come into effect. This intent is further emphasized in the legislative history of the statute.

The comments of this Department were included in the report of the House Committee on the Public Lands which recommended enactment of the legislation:

> * * * Another reason for the reservation of the minerals is that this law will induce the entry of lands in those mountainous regions where deposits of mineral are known to exist or are likely to be found. To issue unconditional patents for these comparatively large entries under the homestead laws might withdraw immense areas from prospecting and mineral development, and without such a reservation the disposition of these lands in the mineral country under agricultural laws would be of doubtful advisability.
>
> *The farmer-stockman is not seeking and does not desire the minerals, his experience and efforts being in the line of stock raising and farming,*

"* * * The legislative history of the Stockraising Homestead Act when it was reported for passage including the discussion that followed relevant to this subject leave us no room to doubt that it was the purpose of Congress in the use of the phrase 'all coal and other minerals' to segregate the two estates, the surface for stock-raising and agricultural purposes from the mineral estate, and to grant the former to entrymen and to reserve all of the latter to the United States."

> which operations can be carried on without being materially interfered with by the reservation of minerals and the prospecting for and removal of same from the land. [Emphasis added.]

H.R. Rep. No. 35, 64th Cong., 1st Sess. 5 (1916).

The House report itself makes the following comment on the provisions:

> It appeared to your committee that many hundreds of thousands of acres of the lands of the character designated under this bill contain coal and other minerals, the surface of which is valuable for stock-raising purposes. The purpose of section 11 is to limit the operation of this bill strictly to the surface of the lands described and to reserve to the United States the ownership and right to dispose of all minerals underlying the surface thereof. The section also provides a method for the joint use of the surface of the land by the entryman of the surface thereof and the person who shall acquire from the United States the right to prospect, enter, extract, and remove *all* minerals that may underlie such lands, this method to be under the direction of the Secretary of the Interior under such rules and regulations as he may prescribe. [Emphasis added.]

Id. at 18.

The record of the floor debates also demonstrates the limited purpose of the patent and the broad effect of the mineral reservation. When queried as to whether the reservation included oil, Representative Ferris, chairman of the Committee on the Public Lands and sponsor and manager of the legislation responded as follows:

Mr. FERRIS. It would. *We believe it would cover every kind of mineral. All kinds of minerals are reserved;* and, more than that, it does not apply to timberlands or to lands susceptible of irrigation or any land that can get water from any known source. It merely gives the settler who is possessed of any pluck an opportunity to go out and take 640 acres and make a home there. * * *

Mr. MOORE of Pennsylvania. If any oil should be discovered on these lands later on, the Government's right to that oil would be preserved under this mineral clause, would it?

Mr. FERRIS. Yes; and further, this act authorizes the reentry upon these lands to extract oil and coal and anything else in the way of minerals that may be on it.

Mr. MOORE of Pennsylvania. The gentlemen does not think it is necessary to specify oil?

Mr. FERRIS. No. That is a mineral. But I have no objection to it being mentioned specifically if it is at all thought necessary. I feel doubly sure, however, it is not.

Mr. MOORE of Pennsylvania. It has been called to my attention that the word "mineral" would not include oil.

Mr. FERRIS. I do not think it is necessary; but if the gentleman thinks there is any conceivable doubt about it we will put it in, because *not a single gentleman from the West who has been urging this legislation wants anybody to be allowed to homestead mineral land.* This does not apply to a single acre of land in my own State, and therefore I have no selfish interest in it. But these gentlemen who are interested in it do not

> want to homestead mineral land or ordinary homestead land or oil land. [Emphasis added.]

53 Cong. Rec. 1171 (1916).

Indeed, the broad scope of the reservation and the limited nature of the grant drew objections from Representative Mondell who compared the provisions of the proposed legislation with the provisions of earlier legislation [7] which provided for agricultural entry of mineral lands: "They [patents under the earlier statutes] convey fee titles. They give the owner much more than the surface; they give him all except the body of the reserved mineral." 53 Cong. Rec. 1234 (1916). In later debates, he objected:

> In the first place, I think the fact should be emphasized that the bill establishes a new method and theory with regard to minerals in the land legislation in our country. It reverts back to the ancient doctrine of the ownership of the mineral by the king or the crown and reserves specifically everything that is mineral in all the land entered. It was, it was claimed, necessary to accept a provision of that kind in order to secure the larger acreage. The Interior Department insisted upon it, and many supported that view. My own opinion is that that policy is not wise and that in the long run it will be found to be infinitely more harmful than beneficial or useful or helpful to anyone, either the individual or the public generally. When one takes into consideration the wide range of substances classed as mineral, the actual ownership under a complete mineral reservation becomes a doubtful question.

54 Cong. Rec. 687 (1916).

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[7] *See* notes 3-5, *supra*.

Neither the Act nor its legislative history indicate any reason to treat gravel differently from its treatment in other Departmental decisions which, under other statutes, hold gravel to be a mineral. *E.g. Layman* v. *Ellis, supra,* and *United States* v. *Isbell Construction Co., supra.* Patents under the Stock-Raising Homestead Act were issued for homesteads, not for gravel enterprises. The patent was not intended to convey the right to use the land for mineral development, that right being reserved to the United States for appropriation under the mineral laws.

The Ninth Circuit in *United States* v. *Union Oil Co. of California, supra,* at 1273-74, n.5, has ruled:

> This is basically a question of legislative intent * * *. To the extent that the argument rests on the meaning of the word [minerals] itself, however, the government is entitled to have the ambiguity resolved in its favor * * *.
>
> Appellees argue that the term "minerals" is to be given the meaning it had in the mining industry at the time the Act was adopted * * *. This is a minority rule, *United States* v. *Isbell Constr. Co.*, 78 Interior Dec. 385, 390-91 (1971), even as applied to permit conveyances. I American Law of Mining § 3.26, at 551-53 (1976).

Appellant does not fully set forth the effect of *Layman* in overruling *Zimmerman. Layman* was not merely a decision which held that sand and gravel would prospectively be deemed minerals; the decision resolved a conflict between parties that had already entered the land and canceled an existing homestead entry to the extent that it included sand and gravel deposits. Furthermore, *Layman* specifically points out that *Zimmerman* was not an accurate statement of the law in 1910 and points to a number of con-

temporary authorities which conflict with *Zimmerman*. Even if we were bound to construe the reservation in accordance with the law in effect when the patent was issued or when the statute was enacted, there is no reason to believe that Congress intended the reservation to be subject to the erroneous rule in *Zimmerman* rather than those other authorities.[8]

Appellant through its counsel contends that the surface of the land consists of sand and gravel and that we should not deem these substances as reserved because their development would destroy the surface and thus nullify the patent. Appellant's argument obscures the Congressional intent to reserve mineral resources for disposal under the mineral laws. If a mineral is not reserved when its development would injure the surface, then even coal in shallow deposits would pass to the homesteader, despite the unambiguous intent of the Act.

We recognize that there is a significant body of law to the effect that mineral reservations do not include the right to destroy the entire surface in developing the mineral. Such rulings arise from the concern that the grantor would have retained dominion over that which he purportedly conveyed and that the grantee would be deprived of the very substance of his bargain without compensation.[9] Holding gravel

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[8] In 1913, the U.S. Geological Survey regarded the presence of gravel as a sufficient basis for classifying land as mineral. U.S. Geological Survey, Department of the Interior, Bulletin 537, *The Classification of the Public Lands*, 138-42 (1913).

[9] The New Mexico Supreme Court has held that a rock deposit is not a mineral reserved under the Stock-Raising Homestead Act. *State ex rel. State Highway Comm'n* v. *Trujillo*, 82 N.M. 694, 487 P.2d 122, 125 (S. Ct. N.M. 1971). The case involved a dispute between the holder of land under a Stock-Raising Homestead patent and a state agency author-

to be a reserved mineral does not deny the holder of a stock-raising homestead patent the substance of his bargain without compensation, because the Act provides for compensation for damages to crops and improvements. In 1949 Congress provided also for compensation for damage to grazing values.[10] In neither the statute's specific reservation of coal nor in its legislative history, is there any indication that surface deposits of coal or other minerals should be deemed excluded from the mineral reservation.

[4] Appellant points out that the reservation does not reserve "all minerals" [11] but "all the coal and other minerals." Appellant argues that under the principle of *ejusdem generis*, sand and gravel are not "other minerals" because they are not similar to coal. However, this rule of construction is applicable where there is a series of specific terms which define a class

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ized by the BLM to remove reserved mineral material from the land. Although the state court did not exercise jurisdiction over the interest of the United States in the rock deposit, it purported to apply Federal law. However, the court expressly rejected the analysis taken in *Skeen* v. *Lynch*, *supra*, and held that Congress did not intend to reserve rock.

The Ninth Circuit, in *Union Oil Co.*, *supra*, at n. 11, relied upon *Skeen* and recognized that the *State Highway Commission* decision was not in harmony with the legislative history of the Stock-Raising Homestead Act. The Supreme Court of New Mexico has subsequently held sand and gravel to be reserved under a reservation of all minerals in *G. W. Burris* v. *State ex rel. State Highway Commission*, 88 N.M. 146, 538 P.2d 418 (S. Ct. N.M. 1975), but distinguishes *Trujillo*, *supra*.

[10] Section 5 of the Act of June 21, 1949, 30 U.S.C. § 54 (1970).

[11] The statute construed in *United States* v. *Isbell Construction Co.*, *supra*, required a reservation of "all minerals." 43 U.S.C. § 315(g) (1970).

so that one may construe a general term by reference to that class. See 2A Sutherland, *Statutes and Statutory Construction*, § 47.18 (4th ed. C. D. Sands 1973). If a dissimilarity with coal were a sufficient basis for excluding a given mineral from the scope of the reservation, then the expression "other minerals" would be only surplusage because every other mineral can be distinguished from coal. Clearly, the use of *ejusdem generis* is not appropriate because the term "coal" provides an insufficient specific enumeration on which to base a construction of the general term "other minerals." *Id.* § 47.20. Such rules of construction are only aids in determining the legislative intent and ought not to be invoked as obstacles to prevent the intent from taking effect. *Id.* § 47.22. *See, e.g., Skeen v. Lynch, supra.*[12]

[5] Appellant contends that the patenting of the land in this case removed it from the status of public land under 30 U.S.C. §§ 601-03 (1970), and that this Department has no jurisdiction over the gravel deposit in issue. This argument ignores the fact that section 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), clearly contemplates the Department's continuing jurisdiction and administration of deposits received by that Act. Such deposits shall fall within the ambit of the Department's enforcement authority. 43 U.S.C. § 1201 (1970).

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[12] In *Bumpus v. United States*, 325 F.2d 264 (10th Cir. 1963), the court applied the *ejusdem generis* rule in holding that sand and gravel were not included in a reservation of "oil, gas and other minerals." The reservation was in favor of a private party who had conveyed land to the United States for reservoir purposes, and the case did not involve construction of a Federal land grant. Furthermore, the rule was applied only when the court determined that the result would be consistent with the intent of the parties to the transaction.

[6] "The extraction, severance, injury, or removal of timber or mineral materials from public lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass * * *." 43 CFR 9239.0-7. *See also* 43 CFR 3602.1. Although 43 CFR 9239.0-7 refers to "public lands," that term can only be defined in context. It is not a term of art having a specific legal effect. *Ben J. Boschetto*, 21 IBLA 193 (1975). In certain contexts, "public land" includes any interest in land administered by the Bureau of Land Management. *See, e.g.*, 43 U.S.C.A. § 1702(e) (West Supp. 1977). The term must be broadly defined when it is used to describe the Department's administrative responsibility to protect mineral resources reserved by the Stock-Raising Homestead Act.

[7] Under 30 U.S.C. § 611 (1970), the status of gravel was only affected in connection with the mining laws. The mineral remains reserved under the Stock-Raising Homestead Act; the Surface Resources Act was not intended to operate as a conveyance of any reserved minerals to holders of stock-raising homestead patents. *Solicitor's Opinion*, M-36417, *supra*. The effect of the statute was to withdraw gravel deposits including those reserved under the Stock-Raising Homestead Act from appropriation under the mining laws. Development of gravel deposits on "public lands" should therefore be consistent with the terms of the Materials Act as amended by the Surface Resources Act. 30 U.S.C. § 601 (1970).

[8] It thus is clear that gravel in a valuable deposit is a mineral reserved to the United States in patents issued under the Stock-Raising Homestead Act.

[9] The State Office determined that appellant owed $13,000 in damages for the removal of about 43,000 cubic yards of material valued at a royalty rate of 30 cents per cubic yard.[13] Appellant argues that this determination is arbitrary, capricious, and unreasonable because appellant leases a similar site from the State of Wyoming and pays only six cents per cubic yard. However, it appears from the record that the 6-cent rate was established by a State agency in 1969 and has not been updated since then, and the record does not make clear that the State established its rate on the basis of then fair market value.

The State Office determination was based upon an appraisal report which considered four sites. The report indicated the royalty rates for materials from those sites, and the sites were compared with the deposit herein concerned on the basis of location, character of the material, access, depth of the material, and thickness of overburden. No comparable evidence was offered by appellant. A hearing will not be ordered in the absence of a specific factual assertion that would show an appraisal is incorrect. *XYZ Television, Inc.*, 33 IBLA 80, 81 (1977). Where the Bureau of Land Management has appraised the dam-

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[13] The appraisal report states the royalty reflects the value in the ground. Departmental regulation 43 CFR 9239.0-8 provides that the measure of damages is determined by the laws of the state in which the trespass is committed. We are aware of no provision of Wyoming law which limits damages to only the royalty value of the material removed, and where state law provides for compensation for damages, the measure of damages may be somewhat higher than the royalty value of the material removed. *See Knife River Coal Mining Co.*, 70 I.D. 16, 18 (1963). Our affirmance of the decision below should not be construed as fixing a limited rule for assessment of damages.

ages for a trespass, the appraisal will not be disturbed in the absence of substantial evidence that the determination is in error. *Hub Lumber Company*, A-29527 (September 17, 1963).[14] Appellant's position was extensively briefed, and neither Appellant nor the Solicitor's Office responded to the invitation to submit written argument as to the effect of the recently decided *United States* v. *Union Oil Company of California*, *supra*. Accordingly, Appellant's request for a hearing and oral argument is denied.

Assuming the State Office figure of 30 cents per cubic yard is a reasonably accurate appraisal, and that the amount of material taken in trespass is 42,675 cubic yards,[15] as reported by Western Nuclear in its letter of January 7, 1976, and apparently accepted by BLM, the payment due is not $13,000 as rounded-off by the appraiser, but rather the sum due is $12,802.50.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

/s/ Joseph W. Goss
JOSEPH W. GOSS
Administrative Judge

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[14] A similar rule applies to appraisals used to determine charges for use and occupancy of rights-of-way. *See e.g.*, *Mountain States Telephone and Telegraph Co.*, 26 IBLA 393, 83 I.D. 332 (1976).

[15] On October 22, 1975, Gary Fletcher of Western Nuclear stated to BLM geologist William D. Holsheimer that 64,333 yards have been used and some 32,000 yards stockpiled.

We concur:

/s/ Martin Ritvo
MARTIN RITVO
Administrative Judge

/s/ Douglas E. Henriques
DOUGLAS E. HENRIQUES
Administrative Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

September Term—November 13, 1981

Before Honorable Robert H. McWilliams and Honorable Jean S. Breitenstein, Circuit Judges and Honorable Hatfield Chilson, District Court Judge *.

No. 79-2290

(D.C. No. 78-129-K)

WESTERN NUCLEAR, INC., a Delaware corporation, authorized and doing business in the State of Wyoming, PLAINTIFF-APPELLANT

v.

CECIL ANDRUS, Secretary of the United States Department of the Interior and the UNITED STATES, DEFENDANTS-APPELLEES

and

WYOMING STOCK GROWERS ASSOCIATION, JOHN ORR and the ASSOCIATED GENERAL CONTRACTORS OF WYOMING, INTERVENORS

STATE OF UTAH and ASSOCIATED GENERAL CONTRACTORS OF WYOMING, AMICI-CURIAE

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* Of the United States District Court for the District of Colorado, sitting by designation.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Wyoming and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is reversed. The cause is remanded to the United States District Court for the District of Wyoming with directions that the decision of the IBLA be vacated and set aside and to remand the matter with direction to dismiss the trespass notice served on Western Nuclear.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX E

1. Section 9 of the Stock-Raising Homestead Act of 1916, 43 U.S.C. 299, provides:

§ 299. Reservation of coal and mineral rights

All entries made and patents issued under the provisions of this subchapter shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal. Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by this subchapter, for the purpose of prospecting for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of

the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior and to be filed with and approved by the officer designated by the Secretary of the Interior of the local land office of the district wherein the land is situate, subject to appeal to the Secretary of the Interior or such officer as he may designate: *Provided*, That all patents issued for the coal or other mineral deposits herein reserved shall contain appropriate notations declaring them to be subject to the provisions of this subchapter with reference to the disposition, occupancy, and use of the land as permitted to an entryman under the subchapter.

2. Section 1 of the Materials Act of 1947, 30 U.S.C. 601, provides:

> § 601. Rules and regulations governing disposal of materials; payment; removal without charge; lands excluded

The Secretary, under such rules and regulations as he may prescribe, may dispose of mineral materials (including but not limited to common varieties of the following: sand, stone, gravel, pumice, pumicite, cinders, and clay) and vegetative materials (including but not limited to yucca, manzanita, mesquite, cactus, and timber or other forest products) on public lands of the United States, including, for the purposes of this subchapter, land described in subchapter V of chapter 28 of title 43, if the disposal of such mineral or vegetative materials (1) is not otherwise expressly authorized by law, including, but not limited to, subchapter I of chapter 8A of title 43, and the United States mining laws, and (2) is not expressly prohibited by laws of the United States, and (3) would not be detrimental to the public interest. Such materials may be disposed of only in accordance with the provisions of this subchapter and upon the payment of adequate compensation therefor, to be determined by the Secretary: *Provided, however*, That, to the extent not otherwise authorized by law, the Secretary is authorized in his discretion to permit any Federal, State, or Territorial agency, unit or subdivision, including municipalities, or any association or corporation not organized for profit, to take and remove, without charge, materials and resources subject to this subchapter, for use other than for commercial or industrial purposes or resale. Where the lands have been withdrawn in aid of a function of a Federal department or agency other than the department headed by the Secretary or of a State, Territory, county, municipality, water district or other local

governmental subdivision or agency, the Secretary may make disposals under this subchapter only with the consent of such other Federal department or agency or of such State, Territory, or local governmental unit. Nothing in this subchapter shall be construed to apply to lands in any national park, or national monument or to any Indian lands, or lands set aside or held for the use or benefit of Indians, including lands over which jurisdiction has been transferred to the Department of the Interior by Executive order for the use of Indians. As used in this subchapter, the word "Secretary" means the Secretary of the Interior except that it means the Secretary of Agriculture where the lands involved are administered by him for national forest purposes or for the purposes of title III of the Bankhead-Jones Farm Tenant Act [7 U.S.C. 1010 et seq.] or where withdrawn for the purpose of any other function of the Department of Agriculture.

3. Section 3 of the Surface Resources Act of 1955 (the Common Varieties Act), 30 U.S.C. 611, provides:

§ 611. Common varieties of sand, stone, gravel, pumice, pumicite, or cinders, and petrified wood

No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: *Provided, however,* That nothing herein shall affect the valid-

ity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common varieties" as used in this subchapter and sections 601 and 603 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more. "Petrified wood" as used in this subchapter and sections 601 and 603 of this title means agatized, opalized, petrified, or silicified wood, or any material formed by the replacement of wood by silica or other matter.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 367979 922

Opposition

Supreme Court, U.S.
FILED
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CLERK

No. 81-1686

In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

WESTERN NUCLEAR, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT WESTERN NUCLEAR, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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WESTERN NUCLEAR, INC.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT

Respondent, Western Nuclear, Inc., adopts the Statement of the Petition except the gravel pit was in existence prior to Respondent's purchase of the land, *Western Nuclear, Inc., v. Andrus*, 475 F. Supp. 654, 655 (D. Wyo., 1979), and for approximately fifty years following passage of the Stock-Raising Homestead Act ("SRHA"), 43 U.S.C. §291 *et. seq.*, the government did not assert any ownership claims to SRHA gravel.

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*Western Nuclear, Inc. is a wholly owned subsidiary of Phelps Dodge Corporation. Black Mountain Mineral Development Company (Pty.) Limited and Southern Peru Copper Corporation may be deemed to be affiliates of Phelps Dodge Corporation.

I. RESPONSE TO PETITIONER'S QUESTION PRESENTED.

Petitioner seeks a determination of whether the reservation "of coal and other minerals" in the patent granted to Respondent's predecessor in title under the Stock-Raising Homestead Act ("SRHA"), 43 U.S.C. §§291-302 (1976) (repealed 1976), reserved "gravel deposits susceptible of commercial exploitation" to the United States.[1] Petitioner's characterization of the issue is deceptive for two reasons: (1) Respondent did not commercially exploit the gravel; and (2) the gravel is common, ordinary, surface gravel.

The record below showed that the gravel was removed from the subject land and applied by Respondent to Respondent's own use and purposes. *Western Nuclear, Inc. v. Andrus*, 664 F.2d 234, 235 (10th Cir. 1981); *Western Nuclear, Inc. v. Andrus*, 475 F. Supp. 654, 655 (D. Wyo. 1979).

The subject gravel is common surface gravel as it makes up the surface of the patented land, except for a thin layer of overburden. 664 F.2d at 238. The government initiated this case with a Trespass Notice[2] issued under a regulation dealing with unauthorized removal of

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[1]Petitioner included a 75 page appendix to the Petition covering the written opinions, decisions and orders of the three tribunals below, the text of the SRHA mineral reservation provision, and certain portions of the Materials Act of 1947 and the Surface Resources Act (Common Varieties Act) of 1955. In this Brief, Respondent will refer to those decisions and statutes by normal citation.

[2]A copy of the Trespass Notice is attached hereto as Appendix I.

"mineral material[3]." Gravel is defined as a mineral material, 30 U.S.C. §601 (1976). Common varieties of gravel are not valuable mineral deposits. 30 U.S.C. §611 (1976). When these statutory sections are read together, it is clear that only common gravel is viewed as mineral material within the meaning of the surface resource statutes, 30 U.S.C. §§601-615 (1976). Since the Trespass Notice alleged ownership of gravel pursuant to the terms of those statutes, the Trespass Notice could only have dealt with ownership of common varieties of gravel. *See* 43 C.F.R. §3600.0-3 (1975).

The question presented, then, is not the ownership of underlying commercially exploitable gravel found in lands subject to the SRHA mineral reservation, but, rather, the issue is the ownership of common variety, or ordinary, gravel on such lands.

The government's statement of the issue also ignores the dramatic and unexplicable change of position regarding the treatment or ordinary surface gravel. This change of position is at least as basic to the case as the question of ownership. For nearly sixty years after the passage of the SRHA and for nearly fifty years after the granting of the subject patent, *Western Nuclear, Inc. v. Andrus*, 475 F. Supp. at 656, the government took no steps to assert any claim of ownership or other interest in SRHA gravel by reason of the SRHA mineral reservation or by reason of the surface resource statutes, 30

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[3]The extraction, severance, injury or removal of timber or mineral materials from public lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass. Trespassers will be liable in damages to the United States, and will be subject to prosecution for such unlawful acts. 43 C.F.R. §9239.0-7 (1975).

U.S.C. §§601-615, at least not in the State of Wyoming.[4] Not only has the government reversed its general policy, it has attempted to do so by a discriminatory method of differentiation; the government is now attempting to persuade this Court that rights to SRHA mineral material are to be controlled by the nature of the owner of the land. If the land be owned by a farmer or a rancher, the owner may use SRHA gravel for private purposes; on the other hand, if the land is owned by a mining company or others, the owner cannot use SRHA gravel.[5]

The Interior Board of Land Appeals ("IBLA") stated in *Pacific Power & Light Co.*, 45 IBLA 127, at 138 (1980):

> Of course, noncommercial sand, rock, clay and other such mineral materials which comprise the substance of surface belong to the owner of the surface estate, and may be used by him. Not every cluster of

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[4]John Orr and Associated General Contractors of Wyoming, Intervenors, both in the District Court and in the Court of Appeals, conducted an investigation into the history of the government's activity in Wyoming in relation to SRHA gravel. The results of that investigation were included in the Brief filed by those Intervenors in the District Court and in the exhibits and attachments to that Brief. The relevant portion of the Intervenors' Brief and the attachments, appendices and exhibits to that Brief reflected that the Wyoming office of the Bureau of Land Management had not asserted ownership of SRHA gravel being removed in other gravel operations or in the gravel pit which is the subject of this controversy prior to October 29, 1975. *Western Nuclear, Inc. v. Andrus*, 475 F. Supp. 654, 655 (D. Wyo. 1979). In fact, for all that Respondent has been able to determine, formally and informally, the present case represents the first instance since the passage of the SRHA where the government has taken any legal steps to assert any claim of ownership to SRHA gravel.

[5]The remarks of Mr. Rising, the government attorney of record in the District Court, to that effect are attached as Appendix II.

> rock or patch of sand may be considered to fall within the purview of the reservation. As we stated in *United States v. Isbell Construction Co., supra*, 41 IBLA at 222, 78 I.D. 394, "[I]t is our further opinion that the sand and gravel deposits here in question did not pass to the State of Arizona but were reserved to the United States, *conditioned only upon a finding that the said deposits are valuable.*" (emphasis added.)

There is nothing in the SRHA, the Materials Act or the Common Varieties Act supporting the IBLA's use of the value test at all, and the value test as posited by the IBLA leaves open the question of when value is to be measured. Is the value of the gravel to be measured in 1916, the date of passage of the SRHA, or on the date of the patent? Even though the gravel was not valuable historically, is it to be reserved because it became valuable in 1975? Does the scope of the reservation change with the rise and fall of construction activity and the corresponding rise and fall in the price of gravel?

The Administrative Procedure Act, 5 U.S.C. §§551-559 (1976 & Supp. IV 1980), requires that adoption of a general policy must be preceded by rule making, or, at the very least, publication in the Federal Register before holding any person liable. 5 U.S.C. §552(a)(1)(D). If the adoption of a policy requires publication, it would certainly seem that a change of policy after 50 years must also be published. In fact, this Court has condemned similar activity by the Department of Interior in *Morton v. Ruiz*, 415 U.S. 199 (1974):

> The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be

> promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations....
>
> ...
>
> Unlike numerous other programs authorized by the Snyder Act and funded by the annual appropriations, the BIA has chosen not to publish its eligibility requirements for general assistance in the Federal Register or in the CFR. This continues to the present time. The only official manifestation of this alleged policy of restricting general assistance to those directly on the reservations is the material in the Manual which is, by BIA's own admission, solely an internal-operations brochure intended to cover policies that "do not relate to the public." Indeed, at oral argument the Government conceded that for this to be a "real legislative rule," itself endowed with the force of law, it should be published in the Federal Register. *Id* at 232 and 234-5.

Were this Court to accept jurisdiction of this case as postured by Petitioner, this Court would be giving tacit approval to the government's change of policy and position without compliance with the mandate of the Administrative Procedure Act. Such a step would allow the government to contravene Article III, Section 2 of the United States Constitution by raising an issue for determination that, in reality, does not exist in the instant case, and should not be addressed by this Court.

II. RESPONSE TO "REASONS FOR GRANTING PETITION."

Petitioner's first reason for this Court to grant the petition is, in reality, a compilation of four separate concepts. First, Petitioner has asserted the importance

of the present controversy because it affects as many as 70,000,000 acres of land. Second, Petitioner claims the Court of Appeals' decision would prevent the government from making future sales of materials from land patented under the SRHA. Third, the legal status of prior purchasers of gravel would be rendered uncertain. Finally, Petitioner implies that granting the petition (and presumably reversing the decision of the Court of Appeals) would be in the best interest of the western states, as the current decision purportedly deprives the states of their rights to obtain free use permits for gravel on SRHA land.

Respondent has no reason to doubt that there are several million acres of SRHA land scattered throughout the western states, and that a majority of it is located in states within the Tenth Circuit.

The Court of Appeals' decision cannot deprive the government of its power to sell (or give — under free use permits) SRHA surface materials. The Court of Appeals correctly determined that the government does not own SRHA gravel, and that being so, the government had no power to sell SRHA gravel in the first instance. In fact the government has consistently adhered to this position in the past.

Apparently, until 1970, there were no regulations for the disposal of mineral material under the provisions of 30 U.S.C. §601. Thus, the disposal power had not yet matured as disposal had to be made in accordance with rules and regulations prescribed by the Secretary. 30 U.S.C. §601. In 1970, when regulations were ultimately adopted by the Department of Interior, the regulations contained the following provision:

> Mineral material disposals may not be made under the act from public lands on which: (1) *There are valid, existing claims to the land by reason of settlement, entry, or similar rights obtained under the public land laws*; (2) there are any unpatented mining claims located either before or after July 23, 1955, which have not been cancelled by appropriate legal proceedings; (3) there are valid unpatented mining claims located on or after July 23, 1955, for valuable minerals that are not a "common variety," occurring in, or associated with "common variety" minerals. 43 C.F.R. §3601.1 (1975) (emphasis added).

A patent under the SRHA certainly is a valid, existing claim to the land under the public land laws.

The Court of Appeals' decision did no more to deprive the government of its sale power than the government had already done for itself. Since disposals of SRHA mineral materials, including ordinary gravel, were forbidden by the regulations, and since government employees are presumed to act legally, there is a presumption that there were no recipients of SRHA gravel whose legal status is uncertain. Since such disposals by the government are forbidden, it is no surprise that the Department of the Interior does not keep separate statistics for disposals of gravel made from SRHA lands.[6] It should be assumed that there were no such disposals from SRHA lands.

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[6]The Petitioner has, by inference, suggested that a portion of the gravel disposed of in government sales of materials was from SRHA lands, but that no records have been kept to ascertain what portion. Petition at 7 n.6.

Finally, the statement that the "burden of the Tenth Circuit's error" will fall most harshly upon the states does not comport with reality; Utah, the only state to have taken a position below disagreed with Petitioner's interpretation of the statute. Petitioner has no more insight as to what is better for the states than do the states themselves.

Petitioner's second reason for granting the Petition is the existence of conflicting interpretations of the SRHA mineral reservation between the Ninth and Tenth Circuits. In fact, there is no conflict. When the Ninth Circuit determined that geothermal steam was a reserved mineral, *United States v. Union Oil Co. of California*, 549 F.2d 1271 (9th Cir.), *cert. denied*, 434 U.S. 930 (1977), it did so in reliance upon the Congressional pattern of protecting energy resources and its belief that the mineral reservation served to separate *unrelated* subsurface resources from the surface estate. Furthermore, the Ninth Circuit relied on the legal doctrine of *ejusdem generis*.

Geothermal steam is a source of energy; gravel is not. Geothermal steam can be tapped, at least conceptually, with minimal interference with surface uses; the subject gravel cannot be utilized without virtual destruction of the surface and total interference with surface uses. Geothermal steam is a substance (or, more appropriately, a source of energy) unrelated to the surface; the subject gravel, except for a thin layer of overburden, comprises the surface of the subject land. Geothermal steam and its potential uses were virtually unknown in 1916; gravel and its uses had been known well before 1916. Finally, in making a determination concerning the application of the mineral reservation to geothermal steam, the Ninth Circuit was making the determination

without guidance of precedent; in the instant case, the Tenth Circuit relied on the precedent set in federal courts *(Bumpus v. United States,* 325 F.2d 264 (10th Cir. 1964)), by federal administrative decision (*Zimmerman v. Brunson,* 39 Pub. Lands Dec. 310 (1910)), and by state law decisions.

To characterize the position of the Ninth Circuit as expansive or the position of the Tenth Circuit as narrow begs the question. Both courts looked to legislative history, Congressional activity, administrative activity, and normal rules of construction to ascertain the intent of Congress. Their decisions are by no means inconsistent.

Petitioner's third reason for this Court to grant the petition is the assertion that Congress intended the SRHA mineral reservation to be very broad. Indeed Petitioner claims that patents issued under the SRHA were to give the patentee rights "strictly to the surface." Petition at 11. Further, Petitioner asserts that both Congress and the Department of the Interior have "consistently recognized that gravel would be treated as a mineral." Petition at 15.

In 1913, this Court stated that the term "mineral" is to be read in accordance with the ordinary meaning of the term. The statute "used the words 'mineral lands,' and intended that they should be applied in their ordinary and popular sense." *Burke v. Southern Pacific Railroad Co.,* 234 U.S. 669, 679 (1913).

At that time and since, at least in legal circles, the term "mineral" in a grant or a reservation, in its ordinary and popular sense, did not include ordinary gravel. *See e.g.* Annot., 95 A.L.R. 2d 843 (1964). Hence, if the

term were to be used in its ordinary sense, the reservation contained in SRHA patents would not encompass ordinary surface gravel.

Moreover, the reservation provision was drafted by the Department of the Interior itself, at a time when its most recent decision, *Zimmerman v. Brunson, supra,* was the controlling precedent. *Zimmerman* held that land chiefly valuable for exploitation of gravel could be homesteaded as nonmineral land principally because the standard authorities did not treat gravel as a mineral.[7] It is inconceivable that the Department of the Interior, when drafting the mineral reservation provision of the SRHA, intended the word "mineral" to include ordinary gravel when its own controlling decision at the time excluded gravel from the meaning of "mineral". Nor does it seem probable that Congress would have had an intent different from that of the Department.

Petitioner's bare assertion that *Zimmerman v. Brunson, supra,* is not controlling because the Department changed its position in *Layman v. Ellis,* 52 Pub. Lands Dec. 714 (1929), thirteen years later is not persuasive. The "abuses under the general mining laws by . . . persons who locate[d] (sic.) mining claims on the public lands for purposes other than that of legitimate mining activity." *Andrus v. Charlestone Stone Products Co., Inc.,* 436 U.S. 604, 616 (1978) (quoting H.R. Rep. No. 730, 84th Cong., 1st Sess. 5 (1955)) developed after *Layman,* and demonstrated the need for the acts of 1947 and

[7]That the standard authorities did not include gravel within the meaning of the term "mineral" is further indication that the ordinary and popular sense of the term did not encompass it either.

1955. Had *Zimmerman* not been overruled, this legislation would have been unnecessary. These acts eliminated gravel from the purview of the term "mineral," except for gravel of distinct and special value. By adopting this legislation, Congress, in essence, was publicly stating that ordinary gravel was not a mineral, had never been a mineral, and all doubt regarding the status of gravel as a mineral was to be resolved.

Petitioner's fourth reason for asking this Court to grant the petition in essence asserts that the Tenth Circuit opinion ignores the common tenet of statutory construction that all doubts in government grants are to be resolved in favor of the government. For this proposition the government cites two prior cases of this Court. One of these, *Andrus v. Charlestone Stone Products Co., Inc., supra,* is illuminating. In that case this Court held that water could not be located as a valuable mineral deposit within the meaning of the mining laws. This decision was based, at least in part, on the fact that "water, of course, is among the most common of the Earth's elements." 436 U.S. at 617.

With the exception of water, it is hard to imagine an "element" of the Earth's crust that is more common than gravel. To treat gravel as a mineral would do as much violence to the mining laws as treating water as a mineral.

Petitioner's fourth reason for granting the Petition is fallacious. This issue does not revolve around a rule of construction, rather the goal is to give effect to Congressional intent.

> It is undoubtedly, as urged by the Plaintiffs in error, the well-settled rule of this Court that public grants are construed strictly against the grantees,

> but they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication....
>
> ....
>
> When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interest and welfare by means of benefits more or less valuable, offers individuals or to corporations as an inducement to undertake and accomplish great and expansive enterprises or works of a *quasi* public character in or through an immense undeveloped public domain, such legislation stands on a somewhat different footing from merely a private grant, and should receive at the hands of the Court a more liberal construction in favor of the purposes for which it was enacted. *Leo Sheep Co. v. United States*, 440 U.S. 668, 682-83 (1979) (quoting *United States v. Denver and Rio Grande R. Co.*, 150 U.S. 114 (1893)).

The SRHA provided for patenting tracts of land of up to 640 acres as an inducement to individuals to settle in "an immense and undeveloped [portion] of the public domain," *Id*, and accordingly, should receive a construction consistent with its beneficial purpose. To hold that ordinary surface gravel is a reserved mineral would be tantamount to holding that patentees (and their successors, purportedly in fee) have little more than grazing leases terminable at the will of the government or at the will of any gravel speculator claiming under the government. Such hollow patents issued to induce settlers to populate the vast unsettled areas of the public domain

as it existed in the early decades of this century would have been a cruel hoax indeed. Such was not the intent of Congress.

III. CONCLUSION.

The fact that much land is affected by the Tenth Circuit's decision is irrelevant. Neither the government, nor gravel purchasers taking under the government, have interests in gravel on SRHA lands. It is improper for the government to dicate what is best for the individual states. No conflict exists among circuits. It is well settled that gravel is not, and has never been, intended to be classified as a "mineral" in grants or reservations. The government may not contravene settled law and practice by an abrupt adoption of a discriminatory distinction without notice and warning. The Petition should be denied.

Respectfully submitted,

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APRIL 1982

APPENDIX I

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

TRESPASS NOTICE

Number
(W-03-4025
State
Wyoming
District
Rawlins
Date
October 29, 1975

CERTIFIED MAIL NO. 632944

Western Nuclear, Inc.
1 Park Central, Suite 387
1515 Arapahoe
Denver, CO 80202

YOU ARE HEREBY NOTIFIED That the Bureau of Land Management has made an investigation and evidence tends to show that you are in trespass. We allege that you [X] are violating [ ] may have violated [ ] have violated the law(s) specified below and the regulation(s) approved by the Secretary of the Interior pursuant to the authority vested in him by said law. Therefore, it is our opinion that you:

Have committed the following act(s):

Unauthorized removal of Federally-owned mineral materials.

Are in violation of the following law(s):

Materials Act of 1947, 68 Stat. 681. Common Varieties Act of 1955, PL 167 - 69 Stat. 367.

And are in violation of the following regulation(s):

43 CFR 9239.0-7.

On the following-described land *(describe the area by legal subdivision if surveyed, or if unsurveyed, by concise reference to such natural landmarks as will clearly identify the area)*:

6th Principal Meridian, Wyoming
T. 29 N., R. 92 W., Section 10: NE¼NW¼, E½W½NW¼

1. [X] Violations, if continuing, *must* stop immediately.

2. [ ] You are allowed days from receipt of this notice to cease the alleged trespass operation.

3. [X] If you have evidence or information which tends to show you are not a trespasser as we have alleged, you are allowed 30 days from receipt of this notice to present such evidence or information at the Bureau of Land Management office shown on the front of this form.

If allegations we have made are correct, you must permanently cease and desist from the violations charged, if you have not already done so. [redacted]

Failure to comply with this notice will result in further action to protect the interests of the United States. You are further advised that no sale of timber or material can be made, and no permit, lease, or license can be issued to a trespasser who has failed to make satisfactory arrangements to satisfy his liability to the United States, as provided in 43 CFR 9239.0–9, 9239.3–2, and 4113.1.

Our office has initiated a survey and appraisal of the mineral material to determine the amount of damages due the United States Government. We anticipate completion of the appraisal and survey within 90 days.

Michael Hanagan — Acting Area Manager
(Signature) (Title)

CERTIFICATE OF SERVICE

I, Dale P. Brubaker

CERTIFY That on the 29th day of October ,1975 , I served written notice

on Western Nuclear, Inc.

of 1 Park Central, Suite 387, 1515 Arapahoe, Denver, CO 80202

the party's address of record, by a true copy of the within notice by [ ] personal service [X] certified mail. If by certified mail, the envelope containing said notice bears registry stamp number 632944 and return receipt marked "for addressee only" has been requested.

Michael Hanagan
(Signature of Server)

Acting Area Manager
(Title)

GPO 942 - 130

APPENDIX II

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

WESTERN NUCLEAR, INC., a Delaware Corporation, authorized and doing business in the State of Wyoming,	)	
Plaintiff,	)	
and	)	
WYOMING STOCK GROWERS ASSOCIATION,	)	
Intervenor,	)	Docket No. C78-129
and	)	
JOHN ORR and THE ASSOCIATED GENERAL CONTRACTORS OF WYOMING,	)	
Intervenors,	)	
vs.	)	
CECIL ANDRUS, Secretary of the United States Department of the Interior, and the United States of America,	)	
Defendants.	)	

PARTIAL TRANSCRIPT OF MOTION PROCEEDINGS

Partial transcript of motion proceedings on the above-entitled matter before the Honorable Ewing T. Kerr, Judge, Cheyenne, Wyoming, held on the 13th day of November, 1979.

APPEARANCES

For the Plaintiff:	Horiskey, Bagley & Hickey Attorneys at Law 400 Majestic Building Cheyenne, WY 82001 By Mr. PAUL J. HICKEY
	and
	Canges and Shaver Attorneys at Law Suite 1025 Capitol Life Center Denver, CO 80203 By Mr. JOHN H. LICHT
For the Intervenor Wyoming Stock Growers Association:	Hirst and Applegate Attorneys at Law 200 Boyd Building Cheyenne, WY 82001 By Mr. GLENN PARKER
For the Intervenors John Orr and The Associated General Contractors of Wyoming:	Ms. Marilyn S. Kite Attorney at Law Suite 0 1050 North 3rd Laramie, WY 82020
For the Defendants:	Mr. LYLE K. RISING Office of the Solicitor Department of the Interior P.O. Box 25007 Denver Federal Center Denver, CO 80225

PROCEEDINGS

* * * *

(The following remarks of Mr. Rising occurred near the end of the proceedings:)

MR. RISING: We would also raise another point in that regard. What the United States is concerned about are commercial gravel operations. The United States, we do not see how a commercial gravel operation in any way, shape or form lends itself to helping the rancher. All it does is lends itself to helping the mineral company or whoever happens to claim -- have a commercial operation. In fact, we would think it would take the land out of the ranch production.

The United States also has no intention of claiming trespass for using sand and gravel on his own land for purposes related to ranching. That is not the intent of the United States.

In fact, the United States has said as much. Let me clarify that.

The regulation cited before, 43 C.F.R., point 1, the United States said it will not sell sand and gravel from land entered under the Homestead Act. That is the policy judgment on the part of the department.

We don't think we ought to sell sand and gravel to

some stranger to the ranch. Neither are we going to let somebody else come along and convert it to his own use.

That does not mean those two positions are inconsistent. It simply means the United States is taking the position of "Hands off." We are not going to take anybody else's commercial deposit but we are not going to let anybody else.

The rancher can use it for ranching purposes. We have no qualm about that.

That is about all we really have on that point. We believe that the Court's judgment was correct and should be upheld on every point.

THE COURT: I am pleased you made the last remarks there about the government policies.

Judge Parker, I think they are a little disturbed on something that will never happen.

MR. PARKER: Your Honor, I think it would be very salutary we have this reported, this position of the government.

THE COURT: I was going to suggest you get a copy of it. Fellows like Mr. Kirkbride could read that and you will sleep better tonight.

I know some of you were disturbed, but I was not disturbed at all because I do not think you are going to be interfered with. If you have a big operation out there and

are selling 50 cubic yards to some industry, you might have a little trouble, but I don't know anyone that is doing that.

You live close to a gravel pit up there, Mr. Davis, but the sugar company has gone out of business so that will not interfere with you.

I appreciate your remarks and I think it will make them feel better.

MR. RISING: The fact of the matter is the Bureau of Land Management does not have that many people and the only way they ever know if this thing is being used commercially is if the Wyoming Department of Environmental Quality informs them. They have to rule on permits.

If talking about a plot less than five acres, we are not going to know anyway.

THE COURT: Do you know of any other instance where this has happened other than Western Nuclear?

MR. RISING: In Wyoming I don't know of any other instance.

THE COURT: I know the State buys gravel for building roads and highways and whatnot, maybe from ranchers. I do not know.

MR. RISING: There have been some other instances in my understanding where the Bureau gives free use permits to the State anyway where, after giving them a free use permit, the State goes in and pays a royalty to the private

owner anyway. So that is interesting.

THE COURT: I will look into the matter.

MR. PARKER: At this time may I sign the stipulation?

THE COURT: I will read it and if I can modify that so as not to change the opinion, I will be glad to accommodate you gentlemen.

I will repeat again, I think you are unduly disturbed over this decision. It received considerable publicity and for technical schools, and I think the School of Mines, in Cal Tech and MIT, they wanted a copy of it. I could see why they would be interested in it.

I do not think you should be disturbed at all.

Very well. I will look into the question of modifying the order.

MR. PARKER: Thank you, Your Honor.

MR. HICKEY: Thank you for your time, Your Honor.

THE COURT: We will take a five-minute recess, then.

(Motion Proceedings concluded 2:45 p.m., November 13, 1979.)

C E R T I F I C A T E

I, William A. Reiner, Official Court Reporter for the United States District Court for the District of Wyoming, do hereby certify that I reported by machine shorthand the proceedings contained herein on the subject motion on the date hereinbefore set forth, and that the foregoing 6 pages constitute a full, true and correct partial transcript.

Dated this 19th day of November, 1979.

WILLIAM A. REINER
Offical Court Reporter

APPENDIX III

AUTHORITIES

U.S. Const. art. III § 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Administrative Procedure Act § 3, 5 U.S.C. § 552(a)(1)

§ 552. Public information; agency rules, opinions, orders, records and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—. . .

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
MAY 7 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1686

In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.,
PETITIONERS

v.

WESTERN NUCLEAR, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Solicitor General
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Washington, D.C. 20530
(202) 633-2217

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Respondent urges the Court to deny the petition of the Secretary and the United States because, it alleges, the government's assertion of rights reserved under the Stock-Raising Homestead Act (SRHA) represents a change of position regarding the treatment of commercially exploitable deposits of gravel which should have been undertaken by rulemaking rather than by adjudication. This argument is without merit.

1. Respondent asserts that "[f]or nearly sixty years after the passage of the SRHA" the government failed to assert its ownership rights in commercially exploitable deposits of gravel reserved under the Act (Br. in Opp. 3). From the time the SRHA, 43 U.S.C. 291 *et seq.*, was passed in 1916 until the enactment of the Surface Resources (Common Varieties) Act, 30 U.S.C. 611, in 1955, Congress intended that gravel, sand, and similar deposits should be treated as locatable minerals subject to patent under the mining laws. Persons wishing to acquire interests in deposits of gravel were entitled to stake claims and apply for patents, which granted them whatever interest the United States had in the lands. See 43 U.S.C. 299; 30 U.S.C. 29. Under that system of disposition the Secretary could not assert trespass claims because the gravel on SRHA land had already been offered by law for the taking.

It is true that between 1955 and 1975 the Department of the Interior did not actively pursue private appropriators of common variety minerals reserved to the United States on SRHA lands. In part, that may have been due to the lesser demand for mineral materials on western lands, the development of which now proceeds at an accelerating pace. Respondent complains that "an investigation into the history of the government's activity in Wyoming * * * reflected that the Wyoming office of the Bureau of Land Management had not asserted ownership of SRHA gravel being removed in other gravel operations * * * prior to October 29, 1975" (Br. in Opp. 4 n.4). But all the instances to which respondent refers were uses made by the Wyoming State Highway Department, which under the applicable statute and regulations (30 U.S.C. 601; 43 C.F.R. 3621.2) is entitled to make free use of gravel on SRHA lands for public projects

upon acquisition of a permit.[1] See Associated General Contractors of Wyoming Amicus Curiae Brief at Exh. A, No. 79-2290 (10th Cir., filed Feb. 28, 1980). Moreover, the Highway Department directive issued July 2, 1975 and attached as Exhibit C to that Brief (*ibid.*) recognizes that:

> The Government views sand, gravel and stone as minerals * * *. When sand, gravel or stone is proposed to be removed from private lands, which have all minerals reserved to the United States, it is necessary that the Department secure a free use permit from the Bureau of Land Management * * *.

Even if it were true that some officials in the Department of the Interior had been aware of private appropriations of gravel from SRHA lands, and had failed to act to restrain the practice, that circumstance would not bar the Secretary from now asserting federal title to the minerals. As this Court stated in *United States* v. *California*, 332 U.S. 19, 40 (1947):

> The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private

---

[1] As respondent asserts (Br. in Opp. 4; see *id.* at 5a), trial counsel for the government stated that the Department would not attempt to restrain the surface owner of SRHA lands from "using sand and gravel on his own land for purposes related to ranching." The Secretary does not consider allowing such use to be contrary to his position here, because it is consistent with the agricultural purposes for which the SRHA was enacted. *United States* v. *Union Oil Co. of California*, 549 F.2d 1271, 1280 n.21 (9th Cir.), cert. denied, 434 U.S. 930 (1977). See also *Pacific Power & Light Co.*, 45 I.B.L.A. 127, 138 (1980).

disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.[2]

2. Respondent now contends for the first time that the Secretary was required by the Administrative Procedure Act, 5 U.S.C. 552(a)(1)(D), to assert the government's right to SRHA reserved gravel deposits only prospectively, through the exercise of rule-making power, rather than by adjudication (Br. in Opp. 5-6). This contention was not raised in the court of appeals or in the district court, nor in proceedings before the Secretary. Moreover, the court of appeals did not say that the Secretary should de-

---

[2] Respondent incorrectly interprets 43 C.F.R. 3601.1 when it suggests that that regulation prohibits mineral material disposals from SRHA lands. The regulation provides that "[m]ineral material disposals may not be made * * * from public lands on which: (1) There are valid, existing claims to the land by reason of settlement, entry, or similar rights obtained under the public land laws * * *." Its intent is simply to segregate lands to which there are inchoate claims —acquired by settlement, entry and the like, and not yet patented—for the orderly administration of the public land laws. Such entries may have been made under numerous statutes which, unlike the SRHA, contained no reservation of minerals. See, *e.g.*, Homestead Act , 43 U.S.C. 161 *et seq.* (repealed 1976); Desert Land Act, 43 U.S.C. 321 *et seq.*; Enlarged Homestead Act of 1909, 43 U.S.C. (1970 ed.) 218 (repealed 1976). See also Bureau of Land Management Manual § 3600.09-(A)(2) (Aug. 1976) ("Any applications for mineral materials must be suspended until the conflicting applications or entries are adjudicated"); *id.* § 3600.08 ("Included in the public lands are * * * minerals reserved to the U.S. (including Stock Raising Homestead Act Lands)").

termine ownership of SRHA gravel deposits through publication of a rule, but unconditionally held that the government released its interest in such deposits when the lands were patented. Under this rationale, the court's decision, if left undisturbed, would apparently foreclose the Secretary from asserting title to gravel and similar mineral materials on SRHA lands, irrespective of any rule he might hereafter publish.

In any event, respondent's belated assertion that the Secretary was required to proceed by rule rather than adjudication is unpersuasive. To begin with, as demonstrated in point 1, *supra*, there has not been the "change of policy" (Br. in Opp. 6) upon which respondent relies as a premise for its conclusion that rulemaking is required. There has been no affirmative indication that commercially exploitable deposits of gravel are not reserved minerals. At best there has been a brief period of nonenforcement between enactment of the Surface Resources (Common Varieties) Act, 30 U.S.C. 611, in 1955, and approximately 1975, when respondent was cited for trespass (Pet. 3).

Moreover, even in cases where agency action *has* represented a change of position about the proper interpretation of a governing statute, this Court has upheld the authority to proceed by adjudication. As is stated in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 293 (1974), quoting *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947), " 'the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.' " That is particularly true in a case like this. Respondent's claim is not that the Secretary has failed to elaborate the meaning of the Materials Act, 30 U.S.C. 601 *et seq.*, and the Surface Resources (Com-

mon Varieties) Act, 30 U.S.C. 611, which make perfectly clear that respondent could not take gravel owned by the federal government except pursuant to the procedure set out in the law and regulations. See also 43 C.F.R. 3602.1; 9239.0-7 (unauthorized removal of mineral materials). It is rather that the Secretary was required to publish regulations expounding upon the reservation of "all * * * minerals" —contained in both the SRHA and the patent to which respondent succeeded, see 43 U.S.C. 299— which retained in the government the title to gravel on respondent's land. But a requirement that the Secretary publish an exhaustive definition of the term "minerals" would impose an enormous and ultimately futile task.[3] Moreover, in the case of gravel such a requirement would be superfluous, since gravel has been consistently recognized as a mineral under the general mining laws, and in reservations qualifying land grants. See Pet. 13-14.[4]

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[3] See 43 C.F.R. 2710.0-5(e) (1975) ("mineral" includes not only substances recognized as such because of their chemical composition, or because of their classification as such in trade or commerce, but also substances which possess economic value for use in trade, manufacture, the sciences, or mechanical or ornamental arts).

[4] Nothing in *Morton* v. *Ruiz*, 415 U.S. 199 (1974), suggests a contrary result in this case. This Court's demand that the BIA publish its eligibility requirements for general assistance benefits was justified there because the unpublished restrictions in the Indian Affairs Manual were contrary to the apparent intent of Congress, and violated the BIA's own rules about formally publishing its substantive policies. *Id.* at 212-230, 233-235. Moreover, "[t]he Secretary * * * presented no reason why the requirements of the Administrative Procedure Act could not or should not have been met. Cf. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947)." *Id.* at 235.

CONCLUSION

For these reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

MAY 1982

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Amicus Brief

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No. 81-1686

In the Supreme Court of the United States

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JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.,
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V.

WESTERN NUCLEAR, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF NEW MEXICO IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the mineral reservation in Section 9 of the Stock Raising Homestead Act, 43 U.S.C. 299, which reserved to the United States title to "all the coal and other minerals" in lands patented under the Act, includes gravel deposits susceptible of commercial exploitation.

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IN THE SUPREME COURT
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BRIEF OF AMICUS CURIAE STATE OF NEW MEXICO IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS

The recent decision handed down by the 10th Circuit Court of Appeals addressed an important issue directly affecting the administration of more than 70 million acres of land pursuant to the

Stock-Raising Homestead Act. As well, the Court of Appeals decision has an important bearing upon the manner in which some 9 million surface and 13 million sub-surface acres are administered by the State of New Mexico. The affected lands belonging to the State of New Mexico were acquired by clear list and patent from the United States Government many years prior to the initiation of this action. In 1850, Congress granted to the Territory of New Mexico to be held in trust, Section 16 and 36 in each and every township within the territorial borders. The sections were to be used for Common School purposes - that is, they were to be leased and sold under the provisions and subject to the restrictions of that act. In the same act, certain quantity grants were made for other specifically enumerated

purposes. Thereafter, by the Enabling Act of 1910, (Enabling Act for New Mexico, June 20, 1910, 36 Stat. 557, Chap. 310), the territory became a state; and by that Act, Congress confirmed the earlier grants and granted to the new state additional school sections 2 and 32 along with additional grants for the support of other institutions. The Enabling Act, along with the statutory powers found at Chapter 19 of the New Mexico Statutes Annotated, placed the Commissioner of Public Lands in the position of constitutional agent of the State of New Mexico in administering state lands. More exactly, as the state lands are held "for the benefit of" the enumerated institutions, the Commissioner administers a true trust. See N.M. Const., Art. XIII, Sec. 2.

The issue in this proceeding is whether the mineral reservation in Section 9 of the Stock-Raising Homestead Act, 43 U.S.C. 299, which reserves to the United States title to "all the coal and other minerals" in conveyances of lands patented under the act includes gravel. New Mexico's interest in this proceeding arises by virtue of the fact that the Commissioner of Public Lands, pursuant to his statutory authority, makes highly similar mineral reservations when issuing leases or patents for state lands. Because much of the law issuing from the state courts in New Mexico makes reference to Federal law on the matter, the ultimate decision of this Court will have a significant impact upon the manner in which New Mexico administers its trust lands.

SUMMARY OF ARGUMENT

The Amicus State of New Mexico submits that the mineral reservation in Section 9 of the Stock Raising Homestead Act, 43 U.S.C. 299, includes gravel. It is asserted that the importance of this issue to all the public land states requires that this Petition for Certiorari be granted.

In addition, the Amicus State of New Mexico notes that the 10th Circuit Court of Appeals decision herein appealed is in conflict with prior decisions rendered by other Federal Courts.

ARGUMENT

Section 9 of the Stock Raising Homestead Act of 1916 (SRHA), 43 U.S.C. 299, set out that all patents issued under the act "shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands

so entered and patented, together with the rights to prospect for, mine, and remove the same." The patentee in the instant proceeding, the Respondent Western Nuclear, Inc., acquired an interest in the involved lands and proceeded to develop a gravel pit thereon. Subsequently the Wyoming Office of the Bureau of Land Management determined that Western Nuclear was in trespass against the United States due to the fact that the gravel removed had been reserved to the United States when the lands were originally patented under the SRHA. The BLM held Western Nuclear liable for the gravel removed from the tract the sequence of events leading to this petition.

The scenario outlined above is not unlike that which has several times in the past involved the Amicus State of New

Mexico in like litigation. See, State ex rel. State Highway Commission v. Trujillo, 82 N.M. 694, 487 P.2d 122 1971; Burris v. State ex rel. State Highway Commission, 88 N.M. 146, 538 P.2d 418 1975; Rickelton v. Universal Contractors, Inc., 91 N.M. 479, 576 P.285 1978. Of those three cases, the Burris and Rickelton decisions were directed at the meaning of mineral reservations in conveyances of State of New Mexico Lands. The Trujillo Case, supra, construed the mineral reservation to patented lands under the Stock Raising and Homestead Act, supra, such as is before this Court.

In Trujillo, supra, the U.S. Government had issued a patent to Trujillo's predecessor, under the Stock Raising and Homestead Act, reserving to the U.S. Government "all the coal and other minerals in the lands." The Bureau of

Land Management then issued the State Highway Commission a permit to remove the material. The New Mexico Supreme Court held that "Rock taken in its exposed state from land owners property by a Highway Commission, which had no rare or exceptional character possessed no peculiar property, given any special value, and which was useful only for road building purposes, was not intended to be reserved to the United States under the Stock-Raising Homestead Act reserving all 'coal and other minerals' in patented lands, and thus land owners were entitled to be compensated for such materials." The reservation of SRHA relied on the Trujillo case (and in Rickelton, supra, as well) that "all coal and other minerals" are reserved has been subsequently construed in the federal courts on two separate occasions, these being

United States v. Union Oil Company of California, 549 F.2d 1271 (9th Cir. 1977), Cert. denied, 435 U.S. 911 1978, and in the instant case in the court below. The 9th Circuit Court of Appeals, contrary to the New Mexico Supreme Court in Trujillo, held that the entryman took the property for stock-raising and agricultural purposes only and that the Geothermal resources, being underground, were reserved as a mineral within the wording "all coal and other minerals." It is submitted that the Union Oil Decision more closely reflects the true intent of Congress that the surface and sub-surface estates were severed by patent issued under the terms of the Stock-Raising and Homestead Act. The intent of Congress is reflected in subsequent federal legislation that has direct ties to the manner in which the states

reserve minerals in lands ceded to them in aid of their public schools. Previously, in New Mexico the conveyance of the states mineral lands were governed by the provisions of Section 10 of the New Mexico Enabling Act, supra. Originally under that act, mineral lands were not excluded from the states authority to alienate its school lands provided that those lands were first appraised, then publically advertised, and finally put to competitive bid in order that the "true value" of those lands would be recovered by the state. However, Section 10 of the Enabling Act was subsequently amended by Article 24 of the New Mexico Constitution with the effect that minerals were taken out of the appraisal advertising and competitive bid requirements. The Constitutional Amendment allowed the New Mexico Legislature to make all the neces-

sary provisions for the disposal of minerals, but "other or natural" products would still be subject to the above mentioned requirements of Section 10.

The need to amend Section 10 was brought about by Congressional enactment of The Dawson School Land Act, found at 43 U.S.C. 870, 44 Stats. at large 1026, Chap. 557. The Dawson Act provided that in sales by the states of lands ceded to them for the support of their public schools there would have to be a reservation "all coal and other minerals," and that the failure to make such a reservation would result in a forfeiture of the lands back to the U.S. Government. Following the articulated Congressional intent in the Dawson Act, supra, and the mandate in Article 24 of the New Mexico Constitution prohibiting the state from

perpetually alienating its mineral lands, the New Mexico Legislature enacted legislation authorizing its Commissioner of Public Lands to specifically lease its minerals instead. (In this regard see, Terry v. Midwest Refining Co., 64 F.2d 428.) In New Mexico's Legislation, found at Section 19-8-1 N.M.S.A., 1978 Comp., et. seq. an express reference to either sand or gravel may not be found within Chapter 19. However, by longstanding administrative interpretation both sand and gravel have been treated as being leasable minerals within the ambit of that chapter.

CONCLUSION

To date the New Mexico Supreme Court has had the opportunity to deal with the issue of the scope of mineral reservations as including sand and gravel in four cases. Once under these

Stock-Raising Homestead Act, supra, and three times under patents of state land. See, State ex rel. State Highway Commission v. Trujillo, 82 N.M. 694, 487 P.2d 122 (1971); Burris v. State ex rel. State Highway Commission, 88 N.M. 146, 538 P.2d 418 (1975); Rickelton v. Universal Constructors, Inc.., 91 N.M. 479, 576 P.2d 285 (1978); and in the as yet unreported case of Jensen v. State Highway Commission, No. 13, 640 (N.M.S.Ct., March 3, 1982). In all of those cases reference has been made to Federal Case Law on the subject either directly, or indirectly through reference to the Trujillo Decision. The unsettled status of the body of Federal Case Law on the subject and by consequence state law places future administration of public lands at both levels of government in critical dispute. Consequently, it is of

paramount importance that the Court seek resolution of the issue.

The Amicus State of New Mexico therefore urges that the Petition for Writ of Certiorari be granted and that the decision of the 10th Circuit Court of Appeals be reviewed and reversed in light of the arguments proposed herein.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

WESTERN NUCLEAR, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the mineral reservation in Section 9 of the Stock-Raising Homestead Act, 43 U.S.C. 299, which reserved to the United States title to "all the coal and other minerals" in lands patented under the Act, includes gravel deposits susceptible to commercial exploitation.*

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*The plaintiff in the district court was Western Nuclear, Inc. The Wyoming Stock Growers Association, John Orr, and the Associated General Contractors of Wyoming were permitted to intervene as parties plaintiff. Defendants in the district court were Cecil B. Andrus, Secretary of the Interior, and the United States. Only Western Nuclear, Inc., appealed from the district court's decision. The Associated General Contractors of Wyoming, and the State of Utah, appeared as amici curiae in the court of appeals. Because Secretary Watt is the successor to Secretary Andrus, we have substituted Secretary Watt as a federal party in this case, pursuant to Rule 40.3 of the Rules of this Court.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 664 F.2d 234. The opinion of the district court (Pet. App. 20a-38a) is reported at 475 F. Supp. 654. The opinion of the Interior Board of Land Appeals (Pet. App. 45a-68a) is reported at 85 Interior Dec. 129.

JURISDICTION

The judgment of the court of appeals (Pet. App. 69a-70a) was entered on November 13, 1981. On February 3, 1982, Justice White extended the time for filing a petition for a writ of certiorari to March 13, 1982. The petition was filed on March 11, 1982, and granted on May 24, 1982. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 9 of the Stock-Raising Homestead Act of 1916, 43 U.S.C. 299; Section 1 of the Materials Act of 1947, 30 U.S.C. 601, and Section 3 of the Surface Resources Act of 1955 (the Common Varieties Act), 30 U.S.C. 611, are set forth in Pet. App. 71a-75a.

STATEMENT

1. The Stock-Raising Homestead Act of 1916 (SRHA), 43 U.S.C. 291 *et seq.*, was enacted "to restore and improve the grazing capacity, and therefore the stock-raising and meat-producing capacity, of the semi-arid lands of the West, and at the same time to furnish homes thereon to the people." H.R. Rep. No. 626, 63d Cong., 2d Sess. 9 (1914). Section 2 of the Act, 43 U.S.C. 292, authorized the Secretary of the Interior to designate as stock-raising lands subject to entry under the Act: "lands the surface of which is, in his opinion, chiefly valuable for grazing and raising forage crops, [which] do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply, and are of such character that six hundred and forty acres are reasonably required for the support of a family * * *." An entryman was permitted, subject to certain conditions, to obtain a patent for up to 640 acres of lands so classified by the Secretary. 43 U.S.C. 293. However, Section 9 of the Act, 43 U.S.C. 299, provided that all patents issued under the Act "shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same."[1]

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[1] Sections 1-8 of the SRHA, 43 U.S.C. 291-298, were repealed by Section 702 of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2787. The repeal does not affect this controversy.

2. In 1926, the United States conveyed certain lands near Jeffrey City, Wyoming, pursuant to the SRHA. The patent contained the following reservation (Pet. App. 21a):

> Excepting and reserving however, to the United States all the coal and other minerals in the land so entered and patented, together with the right to prospect for, mine, and remove the same pursuant to the provisions and limitations of the Act of December 29, 1916.

In 1975 respondent, Western Nuclear, Inc., purchased the outstanding interest in a portion of the patented lands and applied to the Wyoming Department of Environmental Quality, a state agency, for a permit to develop a gravel pit. Its purpose in doing so was to further its commercial operations of mining and milling uranium ore around Jeffrey City, Wyoming. In connection with that business it needed gravel for road surfacing, paving aggregate, shaft concrete aggregate, and other related uses (Pet. App. 3a). After obtaining the permit, Western Nuclear removed approximately 43,000 cubic yards of gravel from the site (Pet. App. 21a).

The government's petition in this case stated that patents had been granted on approximately 70 million acres of land subject to the Stock-Raising Homestead Act (Pet. 7). See Department of the Interior, Bureau of Land Management, *Public Land Statistics 1980*, Table 24 at 50. We are now informed by the Department of the Interior that although homestead entries were made on more than 70,000,000 acres, patents were issued for slightly more than 33,000,000 acres. See Department of the Interior, *Report of the Director of the Bureau of Land Management, 1948*, Statistical Appendix, Table 17 at 22. The number of unperfected entries pending does not appear to be large. See *Public Land Statistics 1980*, *supra*, Table 20 at 46. Further entries are not possible since the repeal of the SRHA.

On November 3, 1975, the Wyoming State Office of the Bureau of Land Management (BLM) served Western Nuclear with notice that its gravel operation constituted a trespass against the United States. The BLM determined that the gravel had been reserved to the United States when the lands were patented under the SRHA, and consequently that the extraction and removal of the gravel was a violation of the Materials Act of 1947, 30 U.S.C. 601 *et seq.*[2] The BLM concluded that Western Nuclear was liable to the United States for $13,000 for the gravel removed from the tract (Pet. App. 22a).

Western Nuclear appealed the BLM's determination to the Interior Board of Land Appeals (IBLA), which affirmed (Pet. App. 45a-68a). The IBLA concluded that the language and purposes of the Act, as well as its legislative history, made clear that gravel "is a mineral reserved to the United States in patents issued under the Stock-Raising Homestead Act" (Pet. App. 65a).[3]

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[2] Section 1 of the Materials Act of 1947, 30 U.S.C. 601, authorizes the Secretaries of the Interior and Agriculture to dispose of common varieties of gravel and similar substances found on the public lands to private parties upon the payment of adequate compensation as determined by the Secretary administering the area. Section 3 of the Surface Resources Act of 1955, 30 U.S.C. 611, generally known as the Common Varieties Act, provides that no deposit of common varieties of gravel and similar substances "shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States * * *." Consequently, private parties now seeking to exploit deposits of common varieties of gravel occurring on the public lands must comply with the provisions of the Materials Act of 1947 and the applicable regulations. See *United States* v. *Coleman*, 390 U.S. 599, 604 (1968).

[3] The IBLA adjusted the damages to $12,802.50 (Pet. App. 67a).

3. Respondent then filed this action under 28 U.S.C. 1331(a) and the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, seeking review of the IBLA's decision. The complaint alleged that the IBLA had erred in determining that the mineral reservation of the SRHA extended to gravel. Respondent also claimed that the Department of the Interior lacked jurisdiction to determine whether the United States still retained ownership of the gravel. The district court concluded that "it is evident from the legislative history, contemporaneous definitions and court decisions that the mineral reservation in the SRHA of 1916 is broad enough to include gravel as a mineral" (Pet. App. 38a). The court also rejected respondent's assertion that the Secretary of the Interior lacked authority to consider the question of ownership of the mineral estate in lands patented under the SRHA (Pet. App. 22a). [4]

4. The court of appeals reversed (Pet. App. 19a). [5] It first held that the Secretary had jurisdiction to consider

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[4] Though it sustained the IBLA's determination concerning the scope of the SRHA mineral reservation, the district court ordered "that the element of damages shall be determined by the collaboration of the Wyoming State Office of the Bureau of Land Management and the landowners, Western Nuclear, Inc." (Pet. App. 40a). The court later amended its judgment to indicate that it might not reach the same conclusions under different factual circumstances. This amended judgment was entered upon the stipulation of the government and the intervenors, Wyoming Stock Growers Association, John Orr, and the Associated General Contractors of Wyoming. Among other things, the intervenors expressed concern that the judgment as originally entered might have the effect of barring a surface owner from using gravel on the lands where the use was related to the stock-raising purposes of the Act (Pet. App. 43a-44a).

[5] One of the arguments made by Western Nuclear in the court of appeals was that the Secretary was required by the Administrative Procedure Act, 5 U.S.C. 552(a)(1)(D), to assert the government's

the extent of the mineral reservation in lands patented under the SRHA, and to determine whether the removal of gravel from patented lands constituted a trespass against the United States (Pet. App. 6a-9a). The court concluded, however, that the reservation of "coal and other minerals" in Section 9 of the SRHA did not extend to gravel.

The court first noted that gravel is not generally considered a mineral in private conveyances involving a mineral estate (Pet. App. 10a-11a). The court also determined that the datum most relevant to the intent of Congress was a 1910 decision by the Department of the Interior, *Zimmerman* v. *Brunson*, 39 Pub. Lands Dec. 310. In that case the Department had decided that deposits of sand and gravel did not render the lands on which they were found "mineral in character" within the meaning of the general mining laws (Pet. App. 12a-13a). Third, the court relied (*id.* at 14a-15a) upon its prior decision in *Bumpus* v. *United States*, 325 F.2d 264 (10th Cir. 1963). The United States there had condemned the surface estate, but had left the owner with a subsurface estate "including all oil, gas and other minerals * * *." The court in *Bumpus* had held that the subsurface estate did not include gravel (*id.* at 267). Finally, the court below relied upon two state decisions which, under analogous circumstances, had held that a reservation of all "coal and

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right to reserved mineral materials through rule-making rather than adjudication (79-2290 Appellant's Opening Br. at 60 (10th Cir.)). The government's Reply Brief in this Court incorrectly stated that this contention was not raised in the court of appeals (Reply Br. 4). The court of appeals did not address the argument.

other minerals" did not include gravel (Pet. App. 17a-19a).[6]

SUMMARY OF ARGUMENT

I

A. With the passage of the Stock-Raising Homestead Act the government departed from an imprecise system of classifying public lands as either mineral or non-mineral—often mistakenly—and restricting use of those lands to comport with their classification. Instead it embarked on a course—still followed—of disposing of public lands with a reservation of all minerals, in order to derive the maximum public benefit from such lands. That approach permitted prompt settlement of lands which might later be mined. It also served to spur development of reserved mineral resources by persons other than the homesteader, and provided a source of revenue in cases where minerals were ultimately discovered.

B. Because the SRHA defines the estates to be created in terms of intended use the reservation of minerals in Section 9, 43 U.S.C. 299, should be read in light of the use Congress envisioned the homesteader making of the surface, and the development Congress foresaw for the reserved minerals. The legislative history of the Act and the character of the lands opened under it demonstrate that Congress wanted to encourage homesteaders to en-

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[6] One of these state cases, *State ex rel. State Highway Commission* v. *Trujillo*, 82 N.M. 694, 487 P.2d 122 (1971), concerned the same issue presented here: whether the mineral reservation of Section 9 of the SRHA extends to deposits of gravel. The other state case, *State Land Board* v. *State Department of Fish & Game*, 17 Utah 2d 237, 408 P.2d 707 (1965), did not arise under the SRHA. It involved a conveyance from the State of Utah which reserved to the State "all coal and other minerals."

gage in small-scale stock-raising, and "to prevent the entry of lands * * * principally valuable for purposes other than those expressed in this act * * *." H.R. Rep. No. 626, 63d Cong., 2d Sess. 3 (1914). It also believed that "[t]he farmer-stockman is not seeking and does not desire the minerals, his experience and efforts being in the line of stock raising and farming * * *." H.R. Rep. No. 35, 64th Cong., 1st Sess. 5 (1916). The corresponding reservation of minerals was made in the broadest possible terms. Consequently, where lands are more valuable for their commercially exploitable deposits of mineral materials like gravel than for grazing, Congress withheld from the rancher the right to develop the mineral resources.

II

A. 1. The explicit provisions of the SRHA conform to this clear congressional intent. Section 9 reserves to the United States "all the coal and other minerals" in SRHA lands. The specific mention of "coal" is not intended to limit the reservation of like minerals. Rather, it was necessary to distinguish between coal and other minerals because coal was not subject to disposition under the Mining Act of 1872, 30 U.S.C. 21 *et seq.*, and the SRHA had to provide for disposal of the resources withheld. The distinction between coal and other minerals was also natural from a drafting standpoint because the statutes on which the SRHA was patterned had reserved only coal, not other minerals.

2. Interpreting Section 9's mineral reservation to include commercially exploitable deposits of gravel is consistent with both the public interest and the interest of the SRHA homesteader. Section 9's reservation was coextensive with the class of minerals subject to location under the general mining law, which restricts development to "valuable mineral deposits." 30 U.S.C. 22. Thus

not every deposit of gravel will warrant interference with the homesteader's surface estate; only those which—in light of the abundance of the resource, the quality of the gravel, the condition of the market, and the distance from buyers—can be extracted at a profit will do so. A corollary of that limitation is that the stock-raising homesteader can make any necessary use of gravel deposits which is consistent with the purposes of the SRHA. No similar justification can be advanced for extraction of large and valuable deposits to further the commercial operation of a mining company outside the patented lands.

B. The damage provisions of the SRHA also show that Congress did not intend to turn commercially valuable gravel deposits over to the homesteader. Although the Congress which passed the Act contemplated that surface mining would take place on SRHA lands, it restricted the homesteader's right to damages to the value of "the crops or tangible improvements." 43 U.S.C. 299. No payment was required for reduction in value of the land itself. In the Open Pit Mining Act of 1949, 30 U.S.C. 54, Congress remedied this unfairness to the homesteader, but even then went no further than to make the miner liable for damage "to the value of the land for grazing."

III.

A. The Mining Act of 1872, 30 U.S.C. 21 *et seq.*, which defines the class of minerals reserved in the SRHA, permitted location of commercially valuable gravel deposits. That interpretation is supported by a long line of cases before the courts and the Department of the Interior. It was also acknowledged by Congress itself, which enacted the Common Varieties Act in 1955, 30 U.S.C. 611, for the express purpose of removing gravel from the coverage of the Mining Law.

Zimmerman v. *Brunson*, 39 Pub. Lands Dec. 310 (1910), holds to the contrary. It was, however, in-

consistent with the "marketability" test applied by the Department at the time, repudiated by other contemporary authorities, and overruled by the Department itself within two decades. More important, it is evident from Congress's purpose in passing the SRHA that the reasons which may have justified *Zimmerman*'s decision in the context of the original Homestead Act, 43 U.S.C. 161 *et seq.*, are out of place in the settlement and development scheme contemplated by the SRHA.

B. Cases construing reservations of "all minerals" in private conveyances are irrelevant to interpretation of the mineral reservation in the SRHA. Unlike private property transfers, the SRHA provides for payment for damages caused by development of gravel deposits on the land transferred. Moreover, settled principles of construction dictate that ambiguities in private deeds be construed against the grantor in order to effectuate the mutual intent of the parties. By contrast, any uncertainty in federal statutory mineral reservations must be construed in favor of the sovereign. *United States* v. *Union Pacific R.R.*, 353 U.S. 112, 116 (1957); *Northern Pacific Ry.* v. *Soderberg*, 188 U.S. 526, 534 (1903).

ARGUMENT

I. THE HISTORY OF THE ADOPTION OF THE SRHA SHOWS A CONGRESSIONAL INTENT TO EFFECT A NARROW GRANT OF SURFACE RIGHTS AND A CORRESPONDINGLY BROAD MINERAL RESERVATION

When it adopted the SRHA in 1916 Congress had only recently embarked on a policy of severing surface rights from subsurface mineral deposits in land grants, in order to derive the maximum public benefit from public lands. The nature of the lands classified for entry under the SRHA, as well as the legislative history of the Act, make

clear that Congress intended to effect that objective in this instance by a grant of surface rights which would encourage stock-raising and forage farming, and a broad reservation to the United States of any mineral value the lands might have. Unauthorized private exploitation of commercially valuable deposits of gravel is inconsistent with that intent.

A. The Policy Of Reserving Mineral Rights In Public Lands Opened For Settlement Was Intended To Maximize The Public Benefit From Such Lands

During the nineteenth century the federal government generally classified public lands as either mineral or nonmineral, and then permitted acquisition of title to the lands according to the appropriate statutory scheme. See *United States* v. *Sweet*, 245 U.S. 563, 566-572 (1918); 1 *American Law of Mining* § 3.1 (1981). This system had obvious difficulties. If the land had been mistakenly classified as nonmineral, the issuance of a patent to a homesteader would transfer title to all subsequently discovered materials. See *Diamond Coal & Coke Co.* v. *United States*, 233 U.S. 236, 239-240 (1914). On the other hand, classification of the land as mineral effectively prevented agricultural development of the surface pending the exploitation of whatever mineral deposits underlay it.

The alternative of severing mineral rights from the surface and allowing separate development of each was initiated after President Theodore Roosevelt—concerned in part with the fraudulent acquisition of coal lands by entries under the agricultural land laws—withdrew some 64 million acres of coal lands from all forms of entry. 41 Cong. Rec. 2614 (1907); P. Gates, *History of Public Land Law Development* 726-727 (1968). See also E. Peffer, *The Closing of the Public Domain: Disposal and Reservation Policies, 1900-50* at 107-108

(1951). In 1907 Roosevelt proposed to Congress that it "inaugurate a system which will encourage the separate and independent development of the surface lands for agricultural purposes and the extraction of the mineral fuels in such manner as will best meet the needs of the people and best facilitate the development of manufacturing industries." 41 Cong. Rec. 2806 (1907). The first step in that direction was taken with the passage of the Coal Lands Act of 1909, 30 U.S.C. 81, which permitted settlers on coal lands later withdrawn from entry to receive a patent which reserved to the United States the rights to the coal. The Coal Lands Act of 1910, 30 U.S.C. 83 *et seq.*, then opened up withdrawn coal lands to settlement, subject again to a reservation of the coal.

The approach of reserving only specific minerals was followed for a few more years. See Act of Apr. 30, 1912, 30 U.S.C. 90 (coal); Agricultural Entry Act of 1914, 30 U.S.C. 121 *et seq.* (phosphate, nitrate, potash, oil, gas, and asphaltic minerals). But it was shortly abandoned in favor of a reservation to the United States of all minerals. The terms of the reservations varied, but they generally provided that the United States would retain "all the coal and other minerals,"[7] "all coal, oil, gas and other minerals,"[8] or simply "all minerals."[9]

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[7] Stock-Raising Homestead Act of 1916, 43 U.S.C. 299; Color of Title Act of 1928, 43 U.S.C. 1068 ("coal and all other minerals"); Underground Water Reclamation Act of 1919, ch. 77, Section 8, 41 Stat. 295 ("all the coal and other valuable minerals") (repealed 1964).

[8] Bankhead-Jones Farm Tenant Act of 1937, ch. 517, Section 44, 50 Stat. 530 (three-fourths interest in "all coal, oil, gas and other minerals") (repealed 1961).

[9] Taylor Grazing Act of 1934, ch. 865, Section 8, 48 Stat. 1272 ("mineral deposits") (repealed 1976); Recreation Act of 1926, 43 U.S.C. 869-1 ("all mineral deposits"). Cf. Federal Land Policy and Management Act of 1976, Section 209(a), 43 U.S.C. 1719(a) ("all minerals").

To be sure, nothing prevented a homesteader who had received a patent to the surface rights from also acquiring the mineral rights from the United States. Yet there were advantages in disposing of surface and mineral rights under two different sets of laws. This obviated the need for unavoidably inexact classification of land as either mineral or nonmineral, and allowed the prompt settlement of mineral lands which it did not then seem feasible to mine. But Congress also wanted to encourage the discovery and exploitation of mineral resources by giving everyone—not just the homesteader—a chance to prospect for them, and by demanding that miners comply with such requirements as the annual performance of a certain amount of labor on the claim. 30 U.S.C. 28. In the case of mineral deposits which were sold or leased, the reservation served an additional and obvious public interest in the collection of revenue. [10]

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[10] At the time the SRHA was passed, the only mineral the government actually sold and received revenue from was coal. See *infra*, pages 18-19. Metalliferous minerals were subject to location under the general Mining Act of 1872, 30 U.S.C. 21 *et seq*. But with the passage of the Mineral Lands Leasing Act of 1920 lands valuable for phosphate, potassium, asphalt, oil, oil shale, gas, and sodium, as well as coal, were leased rather than opened to free mining. 30 U.S.C. 181 *et seq*. And with the passage of the Common Varieties Act in 1955, 30 U.S.C. 611; see 30 U.S.C. 601 *et seq*., minerals such as gravel became subject to sale by competitive bidding. The SRHA provided that reserved minerals would "be subject to disposal * * * in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal." 43 U.S.C. 299.

B. Congress Severed The Surface And Mineral Rights On SRHA Lands In Order To Promote Stock-Raising Homesteads, While Reserving To The United States The Right To Develop "All * * * Minerals"

It is clear from the legislative history of the SRHA that Congress intended to promote small-scale stock-raising, reserving to the United States the commercial exploitation of minerals on SRHA lands. The nature of the land to be granted under the Act underlines this conclusion. The reason for allowing settlement of 640 acres, rather than the 160 permitted under the Homestead Act, 43 U.S.C. 161 *et seq.*, was that the land was too poor to support families on a lesser acreage. H.R. Rep. No. 35, *supra*, at 4-5. As Representative Ferris, Chairman of the Public Lands Committee, stated "No arable or irrigable land or mineral land is to be settled under this bill; no land in any section of the country where they have rainfall enough to raise enough to live on can be homesteaded under this bill. * * * [T]his bill * * * will cause the Secretary of the Interior, * * * to pick out a lot of high, dry, nonagricultural grazing land, and it will give 640 acres to a man and his family to live upon." 52 Cong. Rec. 1808 (1915). Thus the Act directed the Secretary "to designate as stock-raising lands * * * lands the surface of which is, in his opinion, chiefly valuable for the grazing and raising forage crops, do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply, and are of such character that six hundred and forty acres are reasonably required for the support of a family * * *." 43 U.S.C. 292. The Department of the Interior perceived the point of the classification requirement to be "to prevent the entry of lands * * * principally valuable for purposes other than those expressed in this act * * *." H.R. Rep. No. 626, *supra*, at 3. Yet, inevitably, some mineral lands would be included. That should not, however, de-

flect the stock-raising homesteader from his original goal. Accordingly, "[a]ll minerals within the land [were] reserved to the United States * * *." *Ibid.*

Consistent with the character of the lands being opened for settlement the purpose of the Act, in the words of its original sponsor, was "to restore and promote the live-stock and meat-producing capacity of the semi-arid States, and at the same time, on the same tract, to furnish homes to landless and homeless citizens of our country." 51 Cong. Rec. App. 683 (1914) (remarks of Rep. Fergusson); H.R. Rep. No. 626, *supra*, at 9, 11. Congress thought it so likely that settlers would engage in stock-raising that it imposed this condition upon entryman wishing to secure title to the lands: "[I]nstead of cultivation as required by the homestead laws the entryman shall be required to make permanent improvements * * * tending to increase the value of the same for stock-raising purposes of the value of not less than $1.25 per acre * * *." 43 U.S.C. 293. As examples of the kinds of improvements the Act contemplated, the original House Report suggested sinking wells, and building fences and silos. H.R. Rep. No. 626, *supra*, at 13.

With respect to the mineral reservation, though, the Department of the Interior stated that "[t]he farmer-stockman is not seeking and does not desire the minerals, his experience and efforts being in the line of stock raising and farming * * *." H.R. Rep. No. 35, *supra*, at 5. The development of those resources was foreseen as a task for others:

> Another reason for the reservation of the minerals is that this law will induce the entry of lands in those mountainous regions [of the United States] where deposits of mineral are known to exist or are likely to be found. To issue unconditional patents for these comparatively large entries under the homestead

> laws might withdraw immense areas from prospecting and mineral development, and without such a reservation the disposition of these lands in the mineral country under agricultural laws would be of doubtful advisability.

Ibid. Consequently, "[t]he purpose of [the reservation] is to limit the operation of this bill strictly to the surface of the lands described and to reserve to the United States the ownership and right to dispose of all minerals underlying the surface thereof. This section also provides a method for the joint use of the surface of the land by the entryman * * * and the person who shall acquire from the United States the right to prospect * * * and remove all minerals * * *." *Id.* at 18. And wherever a reference is made to the types of minerals encompassed by the reservation, it is made in the broadest terms. "[I]t would cover every kind of mineral. All kinds of minerals are reserved * * *." 53 Cong. Rec. 1171 (1916) (remarks of Rep. Ferris); 54 Cong. Rec. 687 (1916) (remarks of Rep. Mondell); H.R. Rep. No. 35, *supra*, at 5 ("All mineral[s] within the lands are reserved"); H.R. Rep. No. 626, *supra*, at 3 ("All minerals within the land are reserved"); *id.* at 15 ("all minerals underlying the surface").

Given the nature of those two estates carved out by the Act, it comports far better with the likely intent of Congress to suppose that commercially exploitable deposits of gravel like those mined by respondent were reserved to the United States for development, than to argue that they passed to the stockman whom Congress envisioned settling on SRHA lands. Cf. *United States* v. *Union Oil Co. of California*, 549 F.2d 1271, 1274 (9th Cir.), cert. denied, 434 U.S. 930 (1977); *Skeen* v. *Lynch*, 48 F.2d 1044, 1046 (10th Cir. 1931). "[T]he Stock-Raising Homestead Act * * * exhibits a continued pattern of defining the estates to be granted in terms of intended use, a pattern

which has become the foundation of multiple use of the public land. The reservation of minerals to the United States should therefore be construed by considering the purposes both of the grant and of the reservation in terms of the use intended. A reservation of minerals should be considered to sever from the surface all mineral substances which can be taken from the soil and which have a separate value." 1 *American Law of Mining, supra*, § 3.26 at 552.

II. THE EXPLICIT TERMS OF THE SRHA SHOW A CONGRESSIONAL INTENT TO RESERVE COMMERCIALLY EXPLOITABLE DEPOSITS OF GRAVEL

A careful consideration of the explicit terms of the SRHA makes clear that Congress carried out its intent to reserve rights to commercial mineral development. That purpose is evident both in the reservation clause itself, and in the other clauses governing mineral exploitation.

A. The Reservation Of "All The Coal And Other Minerals" In Section 9 Of The SRHA Is Intended To Include Commercially Exploitable Deposits Of Gravel

If viewed in the context of the entire Act and its historical purpose, the terse reservation to the United States of "all the coal and other minerals in [SRHA] lands" is most correctly understood as including mineral materials such as gravel. The specific enumeration of "coal" was not designed to have a limiting effect, but rather responded to the historically anomalous position of coal in American mining law. The more significant reservation of "all * * * other minerals" protects the public interest which Congress had in mind, but is also compatible with the individual interests of patentees, whose population of SRHA lands Congress wished to encourage.

1. The Specific Enumeration of "Coal" In Section 9's Reservation Does Not Limit The Effect Of The Clause

The court of appeals suggested at several points (Pet. App. 15a, 16a, 18a-19a) that the specific enumeration of "coal" in the phrase "all the coal and other minerals" might mean that only minerals ejusdem generis were reserved to the United States. It could, for example, indicate a congressional preoccupation with "energy sources" (Pet. App. 16a, quoting *United States* v. *Union Oil Co. of California*, *supra*, 549 F.2d at 1279), to the exclusion of mineral materials such as gravel. See also *Bumpus* v. *United States*, 325 F.2d 264, 267 (10th Cir. 1963). In fact, however, the reason for listing coal separately was that it was at the time sui generis among minerals, and warranted unique mention.

Unlike other minerals, including sand and gravel, see *Layman* v. *Ellis*, 52 Pub. Lands Dec. 714 (1929), coal has never been subject to location under the mining laws. Almost simultaneously with the passage of the Mining Act of 1872, 30 U.S.C. 21 *et seq.*, which allowed free mining of all valuable mineral deposits on land belonging to the United States, Congress passed the Coal Lands Act of 1873, 30 U.S.C. 71 *et seq.*, which provided for sale of coal deposits in the public domain.[11] Under those two Acts, miners wishing to claim minerals other than coal needed simply to satisfy the requirements of a valid location. 30 U.S.C. 26. (They could also, if they wished,

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[11] Each act had antecedents in the prior decade which included many of its essential features. The Mining Act of 1872 was preceded by the Mining Act of 1866, ch. 262, 14 Stat. 251, and the Placer Act of 1870, ch. 235, 16 Stat. 217. The Coal Lands Act was preceded by laws in 1864 and 1865 setting acreage and payment provisions for coal lands. 13 Stat. 343; 13 Stat. 529.

acquire a patent for a nominal fee. 30 U.S.C. 29.) By contrast, those wishing to acquire coal had to purchase the land at the minimum price of $10 or $20 per acre, 30 U.S.C. 71, and often for considerably more. See P. Gates, *supra*, at 728. Moreover, miners were entitled to an unlimited number of locations under the general Mining Act, while the Coal Lands Act permitted "only one entry by the same person or association of persons * * *," 30 U.S.C. 74, and that entry could be made only upon a limited number of acres. 30 U.S.C. 71; see *United States* v. *Trinidad Coal & Coking Co.*, 137 U.S. 160, 169 (1890). [12] In recognition of these differing methods of disposition, Section 9 of the SRHA not only reserved rights to coal and other minerals separately, but provided in its second sentence that "[t]he coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal." 43 U.S.C. 299. [13]

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[12] In contrast to coal, petroleum was generally thought to be subject to disposition under the Placer Act of 1870. See *Roberts* v. *Jepson*, 4 Pub. Lands Dec. 60 (1885); *Piru Oil Co.*, 16 Pub. Lands Dec. 117 (1893). Although there was some uncertainty about the question, see *Downey* v. *Rogers*, 2 Pub. Lands Dec. 707, 709 (1883); *Union Oil Co.*, 23 Pub. Lands Dec. 222 (1896), it was resolved by the Oil Placer Act of 1897, ch. 216, 29 Stat. 526, which simply provided "[t]hat any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims * * *."

[13] The distinction between coal and other minerals was so marked that an earlier version of SRHA, H.R. 9582, 63d Cong., 2d Sess.(1914), actually speaks of coal as though it were not a mineral at all. The reservation clause in that bill provided "[t]hat all entries * * * shall * * * contain a reservation to the United States of *all the*

In addition to the different method of disposal which characterized coal, there was another factor underlying the unique specification of coal in the SRHA reservation. At the time the SRHA was enacted in 1916 Congress had only some seven years' real experience with reserving minerals in land grants, and with one notable exception [14] the mineral reserved during that period had been coal. The Coal Lands Act of 1909, 30 U.S.C. 81, allowed an entryman on subsequently withdrawn coal lands to complete his settlement, giving him a patent which would "contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same." The Coal Lands Act of 1910, 30 U.S.C. 83 *et seq.*, authorized entry on lands which had been withdrawn or classified as coal lands, but provided that the patent should "contain a reservation to the United States of all the coal in the lands so patented, together with the right to prospect for, mine, and remove the

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minerals and coal in the lands so entered and patented * * *. The *mineral and coal deposits* in such lands shall be subject to disposal by the United States in accordance with the provisions of the *mineral and coal land laws* in force at the time of such disposal. Any person qualified to locate and enter *mineral or coal* deposits * * * shall have the right at all times to enter upon the lands * * *." The bill is reproduced in H.R. Rep. No. 626, *supra*, at 1-2 (emphasis added).

[14] The notable exception was the Agricultural Entry Act of 1914, 30 U.S.C. 121 *et seq.*, which reserved phosphate, nitrate, potash, oil, gas, and asphalt. That Act followed what Congress apparently viewed as a successful experiment with a similar reservation applicable only to the State of Utah. 37 Stat. 496; see P. Gates, *supra*, at 740. There were during the nineteenth century several reservations of quite limited scope. See Bate, *Mineral Exceptions and Reservations in Federal Public Land Patents*, 17 Rocky Mtn. Min. L. Inst. 325, 368-377 (1972); Mall, *Federal Mineral Reservations*, 20 Rocky Mtn. Min. L. Inst. 399, 401-403 (1975).

same." 30 U.S.C. 85. An Act of Apr. 30, 1912, 30 U.S.C. 90, made the 1910 Act applicable to state selections, reserving to the United States "the coal in all such lands so selected * * * and * * * the right to prospect for, mine, and remove the same * * *." It is therefore quite natural that Congress, in framing the more expansive language of the SRHA in 1916, should say that patents should "contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together will the right to prospect for, mine, and remove the same." 43 U.S.C. 299.

The separate enumeration of coal and other minerals was thus functionally useful because the two were subject to different methods of disposal, and natural from a drafting standpoint because the most obvious precedents were coal reservations. [15] But there is no suggestion whatever in the statute or its history that the mention of coal was to have some further significance in the interpretation of the SRHA. On the contrary, the House Report on the bill, in its discussion of the reservation clause, uses the phrases "coal and other minerals" and "all minerals" interchangeably:

> It appeared to your committee that many hundreds of thousands of acres of the lands of the character designated under this bill contain *coal and other minerals*, the surface of which is valuable for stock-raising purposes. The purpose of section 11 [*sic*] is to

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[15] The extent of Congress's reliance on the Coal Lands Acts for drafting purposes goes beyond the reservation itself. The language describing the entry rights of prospectors, the rights of mineral developers who have acquired deposits, and the provisions for protection of the surface owner is, with a few modifications, identical to that in the 1910 Act. Compare 43 U.S.C. 299 with 30 U.S.C. 85. See also 30 U.S.C. 81.

> limit the operation of this bill strictly to the surface of the lands described and to reserve to the United States the ownership and right to dispose of *all minerals* underlying the surface thereof. This section also provides a method for the joint use of the surface of the land by the entryman of the surface thereof and the person who shall acquire from the United States the right to prospect, enter, extract, and remove *all minerals* that may underlie such lands * * *.

H.R. Rep. No. 35, *supra*, at 18 (emphasis added).

2. The Reservation Of "All * * * Other Minerals," Including Gravel Which Can Be Commercially Developed, Is Consistent With The Interests Of The Public And The SRHA Homesteader

The language of Section 9 of the SRHA carries out the intent of Congress, evident in the history of the SRHA, to effect a very broad mineral reservation. What it says is that, in addition to coal, "all the * * * minerals" on SRHA lands are reserved to the United States. To give that phrase an overly literal reading, however, would be inconsistent with Congress's dual purposes—encouraging stock-raising homesteads *as well as* mineral development. As this Court stated in construing a similar mineral reservation, "the scientific division of all matter into the animal, vegetable or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom, and therefore could not be excepted from the grant without being destructive of it." *Northern Pacific Ry.* v. *Soderberg*, *supra*, 188 U.S. at 530. To conclude that traces of any mineral on patented lands could subject the homesteader to the inconvenience of entertaining prospectors would do much to deter settlement. By the same token, to say that the homesteader had no right to use building stone, sand, gravel, and other

common variety minerals for his own purposes would pose a considerable impediment to the task of establishing a home and raising stock. The court of appeals was concerned that, under the position taken by the government, "the patentees would own only the dirt, and little or nothing more" (Pet. App. 19a). A common sense reading of the Act, however, entails none of those consequences.

Section 9 of the SRHA, after stating that patents under the Act must contain a reservation of "all the * * * minerals" in the patented lands, goes on to provide that "[t]he * * * mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the * * * mineral land laws in force at the time of such disposal." 43 U.S.C. 299. That direction carried out the desire of Congress to maximize the public benefit from opening SRHA lands by subjecting surface and mineral development to two different systems of regulation: prompt use of the surface was permitted, but at the same time anyone—not just the homesteader—interested in developing the lands' mineral resources was encouraged to do so, in order to increase the mineral wealth of the country and provide revenues to the United States. The reservation of minerals in Section 9 was thus coextensive with the class of minerals which prospectors were allowed to develop under the "mineral land laws." Putting coal to one side, the primary statute governing mineral development at the time the SRHA was passed in 1916 was the Mining Act of 1872, 30 U.S.C. 21 *et seq.*, which permitted exploration and location only for "valuable mineral deposits." 30 U.S.C. 22. Mineral exploitation of SRHA land was thus made subject to the same restrictions which characterize development of lands under the general mining law.

Foremost among those restrictions is the limitation imposed by the word "valuable." In interpreting the demands of that qualification, this Court has stated:

> [I]n order to qualify as "valuable mineral deposits," the discovered deposits must be of such a character that "a person or ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine [.]" * * * Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable.

United States v. *Coleman*, 390 U.S. 599, 602 (1968). The Court went on to uphold the Secretary's requirement that only minerals which could be marketed at a profit could qualify for location under the mining law. As applied to SRHA lands, what that test means is that the mineral reservation embraces only deposits of gravel and other mineral materials which are commercially exploitable and would justify a mineral entry. Cf. *United States* v. *Isbell Construction Co.*, 78 Interior Dec. 385, 394 (1971). The very abundance of the resource is a limitation on the mineral prospector's ability to extract it at a profit. Commercial exploitability will also depend on the quality of the gravel, the condition of the market, and the distance from buyers.

The corollary principle is that use by the stock-raising homesteader of mineral materials for purposes consistent with the objectives of the Act is permitted (see Br. in Opp. App. 5a-6a). [16] See *United States* v. *Union Oil Co. of*

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[16] The Department's attorney correctly stated to the trial court that "[t]he United States * * * has no intention of claiming trespass for using sand and gravel on his own land for purposes related to ranching" (Br. in Opp. App. 5a). However, he incorrectly interpreted 43 C.F.R. 3601.1 to mean that the United States would not sell sand and gravel from SRHA lands (Br. in Opp. App. 5a). 43 C.F.R. 3601.1 provides that

California, supra, 549 F.2d at 1280-1281 n.21; *Pacific Power & Light Co.*, 45 I.B.L.A. 127, 138 (1980). Congress has frequently recognized the desirability of allowing free use of reserved minerals by the holder of the surface interest where it promotes larger statutory purposes at little cost. The Coal Lands Acts of 1909 and 1910, for example, explicitly provided that "[t]he owner under such patent shall have the right to mine coal for use on the land for domestic purposes prior to the disposal by the United States of the coal deposit." 30 U.S.C. 81, 85. See also Taylor Grazing Act of 1934, 43 U.S.C. 315d (use of timber, stone, gravel, clay, coal, and other deposits for

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[m]ineral material disposals may not be made * * * from public lands on which: (1) There are valid, existing claims to the land by reason of settlement, entry, or similar rights obtained under the public land laws * * *.

Its intent is simply to segregate lands to which there are inchoate claims—acquired by settlement, entry and the like, and not yet patented—for the orderly administration of the public land laws. Such entries may have been made under numerous statutes which, unlike the SRHA, contained no reservation of minerals. See, *e.g.*, Homestead Act, 43 U.S.C. 161 *et seq.*; Desert Land Act, 43 U.S.C. 321 *et seq.*; Enlarged Homestead Act of 1909, ch. 160, 35 Stat. 639. See also Bureau of Land Management Manual § 3600.09-(A)(2) (Aug. 1976) ("Any applications for mineral materials must be suspended until the conflicting applications or entries are adjudicated"). 43 C.F.R. 3600.0-3 states that "[t]he Materials Act * * * authorizes the disposition of mineral materials including * * * gravel, * * * in the public land of the United States * * *." The BLM Manual provides in § 3600.08 (Aug. 1976) that "[i]ncluded in the public lands are * * * minerals reserved to the U.S. (including Stock Raising Homestead Act Lands)." In the section dealing with sales of mineral materials the prior edition of the Manual stated: "If the land is patented under the Stock Raising Homestead Act, a bond * * * may be required if other means of protecting the surface owners * * * are not used." VI BLM Manual, Pt. 4, ch. 4.6, § 4.6.21 (Rel. No. 98) (Jan. 9, 1961). Cf. Department of the Interior, Division of Public Lands, *Solicitor's Opinion*, M-36417 (Feb. 15, 1957).

firewood, fencing, buildings, mining, prospecting, and domestic purposes); 30 U.S.C. 612(c) (miner's right to use timber for prospecting, mining, or processing prior to issuance of patent); *Northern Pacific Ry.* v. *Soderberg*, *supra*, 188 U.S. at 529 (railway's right, despite a mineral reservation, to use dirt, stone, and timber for construction). In contrast to those acts, the homesteader's rights under the SRHA are not explicitly stated. Such an interpretation is nonetheless manifestly consistent with the SRHA's intent to encourage settlement of largely barren western lands. Appropriation to the extent necessary for a stock-raising homestead results in only a minimal reduction of the reserved resources. The Department and the courts have, under similar circumstances, recognized the same right where it was not explicit in the statute. See, *e.g.*, *Alabama Coal Lands-Act of Apr. 23, 1912*, 41 Pub. Lands Dec. 32, 33 (1912) ("There is at this time no law which provides for the disposition of the coal in these lands. Persons having homestead entries, pending or perfected, obtain no right to mine coal therefrom, except for their own domestic use * * *"); *Shiver* v. *United States*, 159 U.S. 491, 497 (1895) (right of homesteader to use timber for house and fences before patent obtained).

The uses which respondent has made of gravel deposits on the SRHA lands it acquired, however, bear no resemblance to the kind of appropriation tolerated by the purposes of the Act. It is true that Western Nuclear did not resell the 43,000 cubic yards of gravel it removed from the patented lands. But trespass on the government's reserved interest is not defined by whether mineral materials taken from SRHA lands are later resold at a profit. 30 U.S.C. 601—the statute which respondent was cited for violating—states that

> the Secretary is authorized in his discretion to permit any Federal, State, or Territorial agency, unit or

> subdivision, including municipalities, or any association or corporation not organized for profit, to take and remove, without charge, materials and resources subject to this subchapter, for use other than for commercial or industrial purposes or resale.

The regulations implementing that section provide that government agencies may be permitted free use for "public project[s]" upon acquisition of a permit. 43 C.F.R. 3621.2. They also allow issuance of free-use permits to non-profit organizations, limited to "disposition of mineral materials having an in-place value [not] in excess of $100 during any one calendar year." 43 C.F.R. 3621.3. The law thus contemplates that free use may be made if gravel is not resold, but only by government and non-profit organizations, only upon acquisition of a permit, only for non-commercial and non-industrial purposes, and (except for government use) only in limited amounts.

Respondent, of course, satisfies none of those criteria. Moreover, unlike homesteaders, whose use is confined to the patented land for purposes consistent with the aims of the SRHA, respondent has used the reserved materials directly or indirectly to further its business of mining and milling of uranium ore. The district court recited the background of Western Nuclear's acquisition and use of the SRHA property (Pet. App. 20a-21a):

> Western Nuclear has been located in Jeffrey City, Wyoming since the early 50's when uranium was first discovered on Green Mountain. Exploration in the area has been going on for more than 10 years. After Western Nuclear had done initial exploration and location of the ore bodies, it began sinking a shaft in September 1975.
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> To keep the sides of the shaft from caving in, the company has been using concrete to shore the shaft. To date, the shaft is about 1500 feet deep. Western Nuclear's contractor hauled gravel from Lander and

> Casper to use in the concrete that was mixed in Jeffrey City.
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> This method of concrete production was very expensive so Western Nuclear began looking for a local source of material. In March 1975 they * * * bought * * * the subject land * * *.
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> Western Nuclear has taken some 43,000 cubic yards of gravel from the site. The majority of it was used for black-topping streets and pouring sidewalks in Jeffrey City.

The court of appeals concluded that respondent used the gravel "to further its own commercial operations" (Pet. App. 3a). The Interior Board of Land Appeals calculated that the value of the gravel taken was $12,802.50 (*id.* at 4a). To forbid such exploitation of the government's reserved minerals will have little impact on ranchers whose settlement the SHRA sought to encourage; to fail to do so, however, would frustrate the Act's direction that people interested in mineral resources must acquire them under the mining laws.

B. The Other Provisions Of The SRHA Governing Mineral Development Demonstrate Congress's Intent To Grant Patentees A Limited Surface Estate

Both respondent (Br. in Opp. 9) and the court of appeals (Pet. App. 19a) have attempted to stand the Act's limitation of the patentee's rights on its head, by arguing that gravel lying close to the surface is part of the surface estate granted by the SRHA. Cf. *Bumpus* v. *United States*, *supra*, 325 F.2d at 267. But the Act does not say that a stock-raising homesteader acquires title to anything lying on or near the surface. The Act's history makes clear that his estate does not extend beyond the surface, but the United States retained title to "all the

* * * minerals in the lands" regardless of their location. 43 U.S.C. 299. The homesteader would not acquire any rights to gold mixed with superficial gravel.

It is undeniable that mining of minerals lying near the surface will often entail some destruction of the surface. But it does not follow that reserving title to gravel would frustrate the purpose of stock-raising homestead grants (Br. in Opp. 13-14; Pet. App. 19a). In the first place coal, which is specifically mentioned in the mineral reservation, had long been mined from the surface by open pit or strip-mining methods, and there is no indication that the Congress which enacted the SRHA intended to preclude such methods of extraction. See Mall, *supra*, 20 Rocky Mtn. Min. L. Inst. at 438. Moreover, the BLM State Office appraisal report on the land at issue in this case stated that "[t]he land was used for grazing before location of the pit and after rehabilitation will most likely be used as grazing land" (Pet. App. 51a). More important, however, Congress included in the SRHA and in subsequent legislation a provision for damages to be paid the homesteader whose land was mined. And the measure of damages allowed provides, in effect, an itemized list of the homesteader's interest in the land, making clear that Congress did not anticipate his assertion of rights to commercially exploitable deposits of gravel.

1. As originally passed, the SRHA provided that one who acquired the right to remove mineral deposits could occupy as much of the surface as necessary for the removal, and was required to pay damages to the surface owner only for "the crops or tangible improvements." 43 U.S.C. 299. The kinds of improvements contemplated were those "tending to increase the value of the [land] for stock-raising purposes," 43 U.S.C. 293, *e.g.*, wells and fences. H.R. Rep. No. 626, *supra*, at 13. Representative Mondell rightly pointed out that "[t]he land * * * occupied for

mining purposes might be the major portion of his entry in some cases, and yet there is no provision in the bill for payment for the land itself." 53 Cong. Rec. 1233 (1916). In *Kinney-Coastal Oil Co.* v. *Kieffer*, 277 U.S. 488 (1928), this Court interpreted a parallel damages provision in the Agricultural Entry Act of 1914, 30 U.S.C. 122, which states in terms similar to the SRHA that prospectors on lands subject to the Act must post security for "all damages to the crops and improvements * * *."[17] The Court held that the government's mineral lessee was entitled to an injunction against the construction of houses and commercial buildings by the homesteader. The only requirement which had to be satisfied was provision for "any damages which the plaintiffs' entry and operations under the lease may have caused to the agricultural improvements or crops of the owner of the surface estate * * *." 277 U.S. at 507. There was no right to damages for "the use made of the surface," *id.* at 505, even though the mineral operations would necessitate occupation of the entire surface. *Id.* at 496. The reason for that limitation on compensation to the homesteader, according to the district court, was that the homestead entry was understood to be for agricultural purposes. *Kinney-Coastal Oil*

[17] The damage provisions of the Agricultural Entry Act of 1914 were arguably more generous than those in the SRHA. The former Act states, in the sentence following that quoted from in text, that those who enter to mine (rather than prospect) are liable for "damages caused thereby to the owner of the land * * *." 30 U.S.C. 122. The Court in *Kinney-Coastal* held, however, that the word "damages" was to be read in light of the specification in the preceding sentence. 277 U.S. at 505. A damage clause similar to that in Section 9 of the SRHA is also found in the Coal Lands Act of 1910, 30 U.S.C. 85 ("all damages to the crops and improvements") though it, like the 1914 Act, is slightly ambiguous.

Co. v. *Kieffer*, 1 F.2d 795, 797 (D. Wyo. 1924).[18] In the words of this Court, "a servitude is laid on the surface estate for the benefit of the mineral estate to the end, as the acts otherwise show, that the United States may realize, through the separate leasing, a proper return from the extraction and removal of the minerals." 277 U.S. at 504. See also *Holbrook* v. *Continental Oil Co.*, 73 Wyo. 321, 338-339, 278 P.2d 798, 804-805 (1955) (SRHA).

Congress later realized that restricting damages to the value which the homesteader had added to the land unfairly deprived him of at least part of the interest he had acquired with a patent. When the extraction was done by strip mining and the land not restored to its original contour, the stock-raising homesteader lost not just his crops and improvements, but also the very value which had attracted him to the land in the first place. See S. Rep. No. 405, 81st Cong., 1st Sess. 3-4 (1949). To rectify that inequity, Congress passed the Open Pit Mining Act of 1949, 30 U.S.C. 54, which provides:

> any person who * * * removes by strip or open pit mining methods, any minerals from any land included in a stock raising * * * homestead entry or patent, and who had been liable under * * * [the Stock Raising Homestead] Act only for damages caused thereby to the crops or improvements of the entryman or patentee, shall also be liable for any damage that may be caused to the value of the land for grazing * * *.

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[18] A similar understanding was voiced in Congress with respect to homestead entries which were allowed under the Coal Lands Act of 1910, 30 U.S.C. 83 *et seq.* In the debates on its passage Rep. Mondell said, if the land "is fit for agricultural purposes it ought to be farmed * * *." 45 Cong. Rec. 6048 (1910).

The specific language of the Act rules out the homesteader's right to recover for other values the land may have. Mall, *supra*, 20 Rocky Mtn. Min. L. Inst. at 422. Thus for example if the government's lessee, in strip mining for some other mineral, were to remove an overlying layer of gravel, the homesteader would not be entitled to compensation for its value. But if that is so, it is difficult to maintain that the right to exploit the deposit of gravel itself belongs to the patentee, and not the United States.

III. THE INTERPRETATION OF THE TERM "MINERAL" IN ANALOGOUS CONTEXTS SHOWS THAT CONGRESS INTENDED TO INCLUDE COMMERCIALLY EXPLOITABLE DEPOSITS OF GRAVEL IN THE SRHA MINERAL RESERVATION

The examination of the history of the SRHA and its explicit terms in Parts I and II has demonstrated that the estate given by Congress to the stock-raising homesteader was not thought to encompass commercially exploitable deposits of gravel. A consideration of the way in which the courts, the Department of the Interior, and Congress itself have interpreted the term "mineral" in analogous contexts confirms that the right to develop gravel deposits was affirmatively reserved to the United States. The cases upon which the court of appeals relied, and the interpretation of the term "minerals" in private conveyances, do not suggest a contrary intent.

A. Gravel Was Included In The Class Of Minerals Locatable Under The General Mining Law, Which Defined The Scope Of The SRHA Mineral Reservation

In Part II it was pointed out that the SRHA mineral reservation was designed to preserve the federal interest in minerals which were subject to location under the Mining Act of 1872, 30 U.S.C. 21 *et seq.* The interpretation of the term "minerals" in that statute demonstrates

that Congress meant to include commercially exploitable deposits of gravel within Section 9 of the SRHA.

1. In *Layman* v. *Ellis*, 52 Pub. Lands Dec. 714 (1929), the Department of the Interior held that land from which the Laymans had removed some 40,000 cubic yards of superficial gravel pursuant to entry under the general mining law was properly classified as mineral land, and not open to entry under the original Homestead Act, 43 U.S.C. 161 *et seq.* In the course of its decision the Department cited the following test for determining the mineral character of public land:

> "The mineral character of the land is established when it is shown to have upon or within it such a substance as—
>
> (*a*) Is recognized as mineral, according to its chemical composition, by the standard authorities on the subject; or—
>
> (*b*) Is classified as a mineral product in trade or commerce; or—
>
> (*c*) Such a substance (other than the mere surface which may be used for agricultural purposes) as possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts * * *."

52 Pub. Lands Dec. 719-720, quoting 1 *Lindley on Mines* § 98 (3d ed. 1914).[19] The Department concluded that gravel, useful for building, paving and railroad ballast, 52 Pub. Lands Dec. at 718, fell within categories (*b*) and (*c*). *Id.* at 720. A similar test was announced by this Court in *Northern Pacific Ry.* v. *Soderberg*, 188 U.S. 526 (1903). There the Railway had been granted land in alternate

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[19] The same test is equally valid today. 1 *American Law of Mining*, § 2.4, at 172 (1981).

sections along its line, with the reservation of "all mineral lands." *Id.* at 529. It challenged Soderberg's right to enter one such section under the general mining law to quarry granite useful for building stone. The Court concluded that the mineral lands reserved "include not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture." *Id.* at 536-537. By way of illustration the Court quoted the following passage from *Midland Ry.* v. *Checkley*, L.R. 4 Eq. 19 (1867):

> "Stone is, in my opinion, clearly a mineral; and in fact everything except the mere surface, which is used for agricultural purposes; anything beyond that which is useful for any purpose whatever, whether it is gravel * * * or the like, comes within the word 'mineral' when there is a reservation of the mines and minerals from a grant of land."

188 U.S. at 536.

Applying these criteria, the courts, the Department, and treatise writers who considered the question before passage of the SRHA in 1916 concluded that gravel and similar mineral materials, if commercially exploitable, should be considered "minerals" within the meaning of the general mining law. See *Loney* v. *Scott*, 57 Or. 378, 385, 112 P. 172, 175 (1910) (building sand); *Bennett* v. *Moll*, 41 Pub. Lands Dec. 584, 586 (1912) (pumice); *Pacific Coast Marble Co.* v. *Northern Pacific R.R.*, 25 Pub. Lands Dec. 233, 240, 244-245 (1897) (marble); *H.P. Bennett, Jr.*, 3 Pub. Lands Dec. 116 (1884) (granite); *W.H. Hooper*, 1 Pub. Lands Dec. 560 (1881) (gypsum); 1 & 2 *Lindley on Mines* §§ 97, 424 (3d ed. 1914) (gravel). Cf. Department of the Interior, United States Geological Survey, Bulletin 537, *The Classification of the Public Lands* 138-142 (1913) (lands containing gravel deposits

could be withdrawn or classified as mineral lands); T.D. 25627, 8 Treas. Dec. 356 (1904).

There is a consistent line of authority to the same effect since the passage of the SRHA. This Court itself stated in *United States* v. *Coleman*, *supra*, 390 U.S. at 604, that "common types of sand, gravel, and stone * * * served as a basis for claims to land patents [under the mining laws] * * *." See also *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 606-607 (1978) ("At the administrative hearing * * * the principal issue was whether the sand and gravel deposits were 'valuable' * * *, in which case the claims would be valid."); *Hallenbeck* v. *Kleppe*, 590 F.2d 852, 856-858 (10th Cir. 1979) (sand and gravel); *Edwards* v. *Kleppe*, 588 F.2d 671 (9th Cir. 1978) (sand and gravel); *Melluzzo* v. *Morton*, 534 F.2d 860, 862-865 (9th Cir. 1976) (sand and gravel); *Verrue* v. *United States*, 457 F.2d 1202 (9th Cir. 1972) (sand and gravel); *United States* v. *Schaub*, 163 F. Supp. 875, 877-878 (D. Alaska 1958) (sand and gravel); *United States* v. *Isbell Construction Co.*, 78 Interior Dec. 385, 390, 393 (1971) (sand and gravel); *Taking of Sand & Gravel from Public Lands For Federal Aid Highways*, 54 Interior Dec. 294 (1933); *Stephen E. Day, Jr.*, 50 Pub. Lands Dec. 489 (1924) (trap rock); *Pacific Power & Light Co.*, 45 I.B.L.A. 127, 138 (1980) (scoria); Department of the Interior, Division of Public Lands, *Solicitor's Opinion*, M-36417 (Feb. 15, 1957) (sand and gravel). Cf. *United States* v. *Barrows*, 404 F.2d 749, 752 (9th Cir. 1968), cert. denied, 394 U.S. 974 (1969); *Palmer* v. *Dredge Corp.*, 398 F.2d 791 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969); *Foster* v. *Seaton*, 271 F.2d 836, 838 (D.C. Cir. 1959); *Burris* v. *State ex rel. State Highway Commission*, 88 N.M. 146, 538 P.2d 418 (N.M. 1975); *Matthews* v. *Department of Conservation*, 355 Mich. 589, 595, 96 N.W.2d 160, 164 (1959); *United States* v. *McCall*, 78 Interior Dec. 71,

78-79 (1971); *United States* v. *Clear Gravel Enterprises, Inc.*, 2 I.B.L.A. 285, 299-301 (1971). But see *Anchorage Sand & Gravel Co.* v. *Schubert*, 114 F. Supp. 436 (D. Alaska 1953), aff'd on other grounds, 224 F.2d 623 (9th Cir. 1955); *State ex rel. State Highway Commission* v. *Trujillo*, 82 N.M. 694, 487 P.2d 122 (1971).

Congress itself, in passing the Common Varieties Act in 1955, 30 U.S.C. 611, stated its understanding that gravel, sand, and other mineral materials had theretofore been locatable under the mining law. The purpose of the 1955 Act was to remove such minerals from the coverage of the mining laws, which permitted the obtaining of a land patent, and to provide for disposition of these common minerals under the Materials Act of 1947, 30 U.S.C. 601 *et seq.* *United States* v. *Coleman*, *supra*, 390 U.S. at 604; S. Rep. No. 554, 84th Cong., 1st Sess. 2 (1955); H.R. Rep. No. 730, 84th Cong., 1st Sess. 5-6, 8 (1955); 101 Cong. Rec. 8743 (1955) (remarks of Rep. Engle). [20]

2. Against this long line of authority the court of appeals cited, in support of its contrary conclusion, a decision by the Department of the Interior rendered six years before the SRHA was passed (Pet. App. 12a-13a). [21]

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[20] See also the Building Stone Act of 1892, 30 U.S.C. 161, in which Congress declared that lands "chiefly valuable for building stone" were subject to entry under the mining laws.

[21] In *State ex rel. State Highway Commission* v. *Trujillo*, 82 N.M. 694, 487 P.2d 122 (1971), also relied on by the court of appeals, the New Mexico Supreme Court held that gravel was not a reserved mineral within the meaning of Section 9 of the SRHA. But see *Burris* v. *State ex rel. State Highway Commission*, *supra* (sand and gravel are reserved minerals in lands patented by the state of New Mexico). The *Trujillo* court based its conclusion on the erroneous supposition that gravel, in order to be a locatable mineral, had to be of a rare or exceptional quality. 82 N.M. at 696, 487 P.2d at 124. But the proper test is simply whether such minerals are presently marketable. See, *e.g.*, *United States* v. *Coleman*, *supra*, 390 U.S. at 601-603; *Hallen-*

In *Zimmerman* v. *Brunson*, 39 Pub. Lands Dec. 310 (1910), the Secretary reversed a decision of the Commissioner of the General Land Office and held that deposits of gravel did not render land mineral in character—and so ineligible for homestead entry—unless the deposits had "a peculiar property or characteristic giving them a special value * * *." 39 Pub. Lands Dec. at 312. Of course, as contemporary authorities were quick to point out, such a requirement was inconsistent with the "marketability" test the Department applied in most other cases to determine whether lands were open to mineral entry. See, *e.g.*, *2 Lindley on Mines*, *supra*, § 424, at 995. Cf. *Northern Pacific Ry.* v. *Soderberg*, *supra*, 188 U.S. at 534 ("The rulings of the Land Department * * * almost uniformly, particularly of late years, have lent strong support to the theory * * * that the words 'valuable mineral deposits' should be construed as including all lands chiefly valuable for other than agricultural purposes * * *.") See also cases cited in note 21, *supra*.

The *Zimmerman* decision is also inconsistent with the reading Congress later gave to the mining laws when it passed the Common Varieties Act. As discussed above, the purpose of the Act was to remove gravel, sand, and other mineral materials from location under the mining law and to provide for their sale outright. But the Act would have been redundant if Congress had read the mining law as *Zimmerman* did, for it expressly stated

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beck v. *Kleppe*, *supra*; *Edwards* v. *Kleppe*, *supra*; *Melluzzo* v. *Morton*, *supra*; *Palmer* v. *Dredge Corp.*, *supra*; *Foster* v. *Seaton*, *supra*; *United States* v. *Schaub*, *supra*. The Ninth Circuit has concluded that *Trujillo*'s erroneous interpretation of SRHA Section 9 could be attributed to its failure to examine the legislative history of the Act. *United States* v. *Union Oil Co. of California*, *supra*, 549 F.2d at 1276 n.11.

that " '[c]ommon varieties' as used in this subchapter * * * does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value * * *." 30 U.S.C. 611. The regulations implementing the Act also recognized that "uncommon varieties" of gravel and sand remain—as all varieties once were—subject to the general mining laws. 43 C.F.R. 3711.1(b); 1 *American Law of Mining*, *supra*, § 2.7N, at 182.19.[22]

Even if the Congress which enacted the SRHA was aware of the *Zimmerman* decision (a hypothesis which the legislative history does not substantiate), there is little reason to suppose that it intended to carry that interpretation of the mining law over to the SRHA's mineral reservation. The result which *Zimmerman* achieved was to open lands bearing gravel deposits to homestead entry, though at the cost of preventing development of the minerals by individuals more anxious than the homesteader to do so. By contrast, the SRHA directed that lands which might hold virtually any kind of minerals were open to stock-raising homestead entries; for purposes of settlement it was thus irrelevant whether

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[22] Though it affected not to be, see 39 Pub. Lands Dec. at 312, the decision in *Zimmerman* was no doubt influenced by the register and receiver's opinion that "the portion of this entry involved in this contest is [not] more valuable for its deposits of gravel and sand than it is for agricultural purposes." *Id.* at 311. The Secretary also laid great stress on the "fact that deposits of sand and gravel occur with considerable frequency in the public domain * * *." *Id.* at 312. The abundance of a particular mineral is indeed relevant to its locatability under the mining laws. But the reason is that widespread occurrence affects its value, rather than disqualifies it altogether from location. See *United States* v. *Coleman*, *supra*, 390 U.S. at 603. Only "valuable mineral deposits" are open to exploration under the mining laws. 30 U.S.C. 22.

gravel was characterized as a mineral or not. On the other hand, to forbid exploitation of mineral materials after settlement would have frustrated Congress's other objective—permitting multiple use of SRHA lands in order to achieve the maximum public benefit from land grants under the Act. It is thus more consistent with the purposes of the SRHA to suppose that Congress, in framing the mineral reservation in Section 9, proposed to incorporate the generally accepted understanding of the term "mineral" rather than the wayward reading given it in *Zimmerman* v. *Brunson*.

B. Cases Construing Reservations Of "All Minerals" In Private Conveyances Are Irrelevant To Interpertation Of The SRHA

In interpreting the mineral reservation in Section 9 of the SRHA the court of appeals (Pet. App. 10a-11a) and respondent (Br. in Opp. 10) have relied on cases construing mineral reservations in deeds and leases between private parties. Those cases have no bearing on whether the SRHA mineral reservation includes commercially exploitable deposits of gravel.

1. The most frequently voiced objection to reading mineral reservations in private conveyances as including gravel is that, because mining it would entail destruction of the surface, it would frustrate the purpose of the parties' agreement not to assume that gravel passed with the surface estate. See, *e.g.*, *Morrison* v. *Socolofsky*, 600 P.2d 121, 123 (Colo. Ct. App. 1979); *Harper* v. *Talladega County*, 185 So. 2d 388, 393 (Ala. 1966); *Bambauer* v. *Menjoulet*, 214 Cal. App. 2d 871, 872-873, 29 Cal. Rptr. 874, 875-876, 95 A.L.R.2d 839, 841-842 (1963); *Farrell* v. *Sayre*, 129 Colo. 368, 373, 270 P.2d 190, 192 (1954); *Witherspoon* v. *Campbell*, 219 Miss. 640, 649-650, 69 So. 2d 384-387, 388 (1954); *Psencik* v. *Wessels*, 205 S.W.2d 658,

659 (Tex. Civ. App. 1947); *Beck* v. *Harvey*, 164 P.2d 399, 401 (Okla. 1945); *Holloway Gravel Co.* v. *McKowen*, 200 La. 917, 931, 9 So. 2d 228, 233 (1942); *Kinder* v. *La Salle County Carbon Coal Co.*, 310 Ill. 126, 134, 141 N.E. 537, 540 (1923).[23] That argument, however, has little bearing on the mineral reservation of the SRHA which, unlike private conveyances, contains an express provision for damages caused by mining activity on homesteaded lands. 43 U.S.C. 299. See 1 *American Law of Mining*, *supra*, § 3.51A, at 580.20. Indeed, in passing the Open Pit Mining Act of 1949, 30 U.S.C. 54, Congress expressly addressed the fact that strip mining on SRHA lands would destroy their value for grazing, and directed that the loss of grazing value (in addition to the crops and improvements covered by the original Act) should be compensated.[24]

Moreover, the emphasis in construction of private conveyances on the parties' intent underlines an equally significant distinction from the reservations made in government grants. Proper construction of the writings

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[23] Other cases suggest that the proper test for inclusion of gravel in a mineral reservation is whether the deposit has some exceptional or unique properties. *Bambauer* v. *Menjoulet*, *supra*, 214 Cal. App. 2d at 874, 29 Cal. Rptr. at 876, 95 A.L.R.2d at 842; *Farrell* v. *Sayre*, *supra*, 129 Colo. at 372-373, 270 P.2d at 192-193; *Watkins* v. *Certain-Teed Products Corp.*, 231 S.W.2d 981, 985 (Tex. Civ. App. 1950) (dictum); *Psencik* v. *Wessels*, *supra*, 205 S.W.2d at 661. However valid that requirement might be to indicate the intent of private parties, it is clear that it surpasses the demands made by the mining laws, and the SHRA, for determining what substances are mineral. See page 36 note 21 & pages 37-38, *supra*.

[24] That there is a difference between reservations in private conveyances and those in statutory transfers is a point explictly acknowledged in some cases addressing the former problem. See, *e.g.*, *Bambauer* v. *Menjoulet*, *supra*, 214 Cal. App. 2d at 874, Cal. Rptr. at 876, 95 A.L.R. 2d at 842.

of private parties demands, in the first instance, restricting one's vision to the document itself, *Praeletorian Diamond Oil Association* v. *Garvey*, 15 S.W.2d 698, 700 (Tex. Civ. App. 1929), and considering where appropriate the situation of the parties and their mutual intent as it is otherwise disclosed. *Witherspoon* v. *Campbell*, *supra*, 219 Miss. at 646, 69 So. 2d at 386; *Holloway Gravel Co.* v. *McKowen*, *supra*, 200 La. at 926-927, 9 So. 2d at 231-232; *Kinder* v. *La Salle County Carbon Coal Co.*, *supra*, 310 Ill. at 134, 141 N.E. at 540. By contrast, the only relevant intent in the construction of the SRHA's mineral reservation is that of Congress. Even the failure to include a reservation in the patent itself will not confer any greater rights on the homesteader, when the reservation is directed in the statute. See *Swendig* v. *Washington Water Power Co.*, 265 U.S. 322, 332 (1924); *Proctor* v. *Painter*, 15 F.2d 974, 975 (9th Cir. 1926).

2. These differences in effect and intent between private and public conveyances have led to different principles of construction which not only invalidate the comparison to private land transfers, but also provide an independent reason for concluding that the SRHA mineral reservation includes commercially exploitable deposits of gravel. It is frequently said that "ambiguities in private deeds reserving mineral rights are construed strictly against the grantor, who is also normally the draftsman." Mall, *supra*, 20 Rocky Mtn. Min. L. Inst. at 410 & n.44; *Holloway Gravel Co.* v. *McKowen*, *supra*, 200 La. at 931, 9 So. 2d at 233. By contrast, this Court has consistently adhered, in reading federal mineral reservations, to the "principle * * * that grants for the sovereign should receive a strict construction—a construction which shall support the claim of the government rather than that of the individual. Nothing passes by implication, and unless the language of the grant be clear and explicit as to the

property conveyed, that construction will be adopted which favors the sovereign rather than the grantee." *Northern Pacific Ry.* v. *Soderberg*, *supra*, 188 U.S. at 534, *United States* v. *Union Pacific R.R.*, 353 U.S. 112, 116 (1957). See also *Andrus* v. *Charlestone Stone Products Co.*, *supra*, 436 U.S. at 617. It is particularly inappropriate to read the government's mineral reservation narrowly when the relevant statutory and historical context, and the understanding of Congress, the courts, and the Department, all weigh in favor of a broad interpretation.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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Respondent's Brief

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In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.,
PETITIONERS,

v.

WESTERN NUCLEAR, INC.
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

DOES THE RESERVATION TO THE UNITED STATES OF "ALL COAL AND OTHER MINERALS" IN LANDS PATENTED UNDER THE STOCK-RAISING HOMESTEAD ACT INCLUDE ORDINARY GRAVEL?

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1686

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.,
PETITIONERS,

v.

WESTERN NUCLEAR, INC.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT

Sixty years after passage of the Stock-Raising Homestead Act of 1916, 43 U.S.C. § 291 ("SRHA") and fifty years after the issuance of a patent to Respondent's predecessor in title, the United States has asserted ownership to ordinary surface gravel deposits on Respondent's ranch land. As the district court below set forth, "It appears that it was not until 1975 that the Wyoming State office of the BLM attempted to be paid for the removal of gravel from patented surface estates." *Western Nuclear, Inc. v. Andrus*, 475 F. Supp. 654, 660 (D. Wyo. 1979) (Pet. App. 32a-33a).

The Respondent, Western Nuclear, Inc. has been involved with mining and milling uranium ore in and around Jeffrey City, Fremont County, Wyoming for more than twenty-five years. Jeffrey City is located approximately sixty miles southeasterly from Lander, Wyoming, the nearest larger population center, in the midst of a large semiarid area marked by sparsely vegetated, sandy, gravelly, alkaline soil and punctuated with outcroppings of rock and rolling semibarren hills.

From time to time during these years, Western Nuclear has obtained gravel for road surfacing, shaft concrete aggregate, paving aggregate and other purposes in connection with its mining, employee housing, ore hauling and milling operations. In March of 1975, Western Nuclear acquired, in fee, a substantial piece of ranch property which included the subject land. The land provided a ready and convenient source of gravel. Vol. III, Adm. Rec., R.O.A. (Pet. App. 21a). The ranch land from which the gravel was extracted, like the surrounding area, is semiarid with little vegetative cover and consists of a thin layer of sandy loam over gravel. (Pet. App. 3a). See photographs attached to Memorandum Brief for Respondent at Exhibits 1-4, *Western Nuclear, Inc. v. Andrus,* 475 F. Supp. 654 (D. Wyo. 1979) (Vol. I., p. 87, R.O.A.).

The original conveyance by the United States of the subject land was by Patent No. 974013, dated February 4, 1926, issued pursuant to the SRHA. In accordance with that Act the patent contained the following reservation:

> Excepting and reserving, however, to the United States all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same pursuant to the provisions and limitations of the Act of December 29, 1916 . . . 39 STAT 862.

475 F. Supp. at 656 (Pet. App. 21a).

Western Nuclear removed certain quantities of ordinary gravel from the area of a preexisting gravel pit, of which approximately 43,000 cubic yards were processed for use, the majority of which was used for black-topping streets and pouring sidewalks in Jeffrey City. (Pet. App. 21a). Thereafter, and on or about November 3, 1975, Western Nuclear was served with a Notice of Trespass dated October 29, 1975, issued under the provisions of 43 C.F.R. 9239.0-7, alleging a violation of the Materials Act of 1947 and the Common Varieties Act of 1955. (Res. App. 1a-2a).

A finding of trespass and an assessment of $13,000 was made by the Wyoming office of the BLM. (Pet. App. 22a). The finding of trespass by the state office was appealed to the Inteior Board of Land Appeals ("IBLA") and was upheld in a May, 1978 decision. *Western Nuclear, Inc.*, 85 Interior Dec. 129, 35 IBLA 146 (1978) (Pet. App. 22a).

Western Nuclear appealed the IBLA decision to the U.S. District Court for the District of Wyoming. The district court framed the question presented by the competing interests: "Issue: Does the Stock-Raising Homestead Act's reservation [of] 'all the coal and other minerals' include gravel?" 475 F. Supp. at 656 (Pet. App. 22a). The district court concluded that "the mineral reservation in the SRHA of 1916 is broad enough to include gravel as a mineral." 475 F. Supp. at 663 (Pet. App. 38a).

The Tenth Circuit Court of Appeals was as precise as the district court in setting forth the issue for determination: "Specifically, the question before us is whether gravel is included in the reservation of 'coal and other minerals.' " The court of appeals concluded "that the gravel here involved is not a reserved mineral, and therefore [we] reverse." *Western Nuclear, Inc. v. Andrus*, 664 F.2d 234, 235 (10th Cir. 1981) (Pet. App. 2a). The court of appeals reasoned that "All things considered, we believe that it was the intent of Congress that gravel *not* be deemed a reserved mineral in a patent issued pursuant to the Stock-Raising Homestead Act of 1916." 664 F.2d at 242 (Pet. App. 19a).

No tribunal below, nor any brief or evidence submitted below, addressed the issue of whether the pertinent mineral reservation includes gravel deposits "susceptible to commercial exploitation." That issue is now presented by the government for the first time.

SUMMARY OF ARGUMENT

I.

The government asks in its Question Presented whether gravel deposits "susceptible to commercial exploitation" were reserved to the United States pursuant to the SRHA mineral reservation. The only issue considered and decided by the tribunals below was whether ordinary surface gravel was reserved to the United States. The Court should not now consider a new issue, especially one for which no evidence was adduced below.

II.

A. Congress was farsighted in anticipating the development of the West. The legislative history of the SRHA amply demonstrates that the Congressional purpose in passing the SRHA was to insure permanent settlers and taxpayers who would build homes, schools, churches and cities in the semiarid West. The SRHA was a means to that end. Congress did not intend to allow free use of gravel to ranchers and deny its use for non-ranching purposes to successors in title.

B. A mineral cannot be definitionally created by applying a test of "commercial exploitability." The mining laws allow the location of a valuable mineral. The term "valuable" qualifies the term "mineral." A finding that a material is valuable because it is marketable does not also make the material a mineral. The government's position erroneously assumes that the definition of value is coextensive with the definition of mineral.

III.

Gravel was not reserved by the SRHA mineral reservation.

The legislative history shows that the purpose and intent of the 1916 Act was to spur permanent Western settlement and economic growth. Any reservation of gravel or other surface materials would thwart that Congressional intent and purpose.

Throughout the history of public land legislation, Congress deemed gravel to be a material, not a mineral — unless it possessed peculiar properties or characteristics giving it special value.

State and federal case law demonstrates that the legal meaning of the term "mineral" does not encompass gravel, absent special circumstances.

The SRHA was drafted by the Land Department. The SRHA was passed just subsequent to Departmental decisions which held gravel not to be a mineral under the general mining laws.

By legal presumption, Congress intended the term mineral to exclude gravel in accordance with contemporaneous usage and adjudication. Since passage of the Act, the Department has taken no steps to claim ownership of SRHA gravel prior to the instant case.

The SRHA patent severed the mineral estate from the surface estate and passed the surface estate to the patentee. Not being a part of the mineral estate, gravel passed to private ownership, not by implication, but by the grant, itself.

All things considered, it was the intent of Congress that gravel not be deemed a reserved mineral in a patent issued pursuant to the SRHA.

ARGUMENT

1. THIS COURT SHOULD NOT ADDRESS A "QUESTION PRESENTED" WHICH WAS NEITHER RAISED NOR CONSIDERED NOR RESOLVED IN THE LOWER TRIBUNALS.

Petitioner now seeks a determination of whether the reservation of "coal and other minerals" in the patent granted to Respondent's predecessor in title under the SRHA, reserved gravel deposits "susceptible to commercial exploitation" to the United States. Petitioner, before both the district court and the court of appeals, did not seek a determination of whether a specific type of gravel deposit, one "susceptible to commercial exploitation," was so reserved. Until the case came before this Court, there existed only the legal question of whether *ordinary* surface gravel is a reserved mineral pursuant to the SRHA. At this late date, the government has injected a factual issue concerning commercial exploitability, an issue upon which no evidence was adduced at any of the proceedings below.

Having failed to persuade the court of appeals that all sand and gravel was reserved to the United States, the Petitioner is attempting to salvage its case by presenting a new question to this Court. Petitioner now suggests that the question all along has been whether gravel which the government characterizes as "susceptible to commercial exploitation" is a reserved mineral.

If a particular issue was not drawn in question in the courts below "it is therefore too late to do so here . . . ." *Quimby v. Boyd,* 128 U.S. 488, 489 (1888). "Ordinarily this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller,* 425 U.S. 231, 233-234

(1976)[1]; *see also California v. Taylor*, 353 U.S. 553, 557 n. 2 (1957); *Lawn v. United States*, 355 U.S. 339, 362-363 n. 16 (1958).

This Court has explained that a federal appellate court requires an issue to be passed upon below, prior to appeal, because it is "essential in order that parties may have the opportuniy to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941).

No lower tribunal at any time in this case has considered evidence regarding a determination of whether or not the subject gravel was susceptible to commercial exploitation. The record is, therefore, silent as to such a factual determination.

The Petitioner is raising the present question as a proposed novel rule of law, and in this instance suggests applying that novel rule to an assumed fact. In the great body of legislation and cases dealing with public land law and mining law there is no recognized rule or standard that a substance becomes a reserved mineral pursuant to a mineral reservation when the substance becomes "susceptible to commercial exploitation."[2]

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[1] In quoting from *Dunigan v. United States*, 274 U.S. 195, 200 (1927), the Court stated that "it is only in exceptional cases coming here from federal courts that questions not pressed or passed upon below are reviewed." In the *Youakim* case, in spite of the fact that the issue before the Court had not been raised below, the Court held that the circumstance of conflict between state and federal statutes justified vacating and remanding the case for further proceedings.

[2] The concept of commercial exploitability may become important in a "marketability test" in a contest with respect to a valid location of a valuable mineral deposit. *See* discussion, *infra*, Part II. B. But whether or when or how a mineral deposit becomes so "susceptible" is an anomaly with respect to mining law. The term suggests no standard or predictability. It can be postulated that all of the planet Earth's constitutents could become "susceptible to commercial exploitation."

Petitioner asks the Court to *assume* that the deposit of gravel at issue in the instant case is a deposit susceptible to commercial exploitation. Petitioner asks that this assumption be made because Respondent utilized the gravel. Respondent did not sell gravel. Commercial exploitability cannot be equated, *ipso facto,* with mere use for a non-ranching purpose.

Respondent believes Certiorari to have been improvidently granted.

II. THE PETITIONER'S QUESTION PRESENTED IS AN OBFUSCATION. IT IS NOT JUSTIFIED IN LAW OR LOGIC. IF THE GOVERNMENT'S POSITION IS ADOPTED AS A RULE OF LAW IT WOULD LEAD TO CHAOS AND CONFUSION AND BE INCAPABLE OF BEING FAIRLY ADMINISTERED.

Petitioner essentially desires a new rule of law that gravel deposits on SRHA land are susceptible to commercial exploitation if utilized or appropriated by any person other than a rancher, and a declaration that, at such point in time as gravel is so utilized for a non-ranching purpose, it is then a reserved mineral.

A. The government has neglected to look to the condition of the country when the SRHA was passed as well as to the purposes declared on the face of the legislative reports. The government's position would lead to an illogical interpretation of legislative intent.

If the government's position is assumed to be correct, the SRHA homesteader and any agricultural successor in interest is entitled to "free use" of the reserved gravel. By this logic is he also entitled to "free use" of other materials and minerals? If available on the land and not susceptible to commercial exploitation, may the SRHA homesteader utilize building stone for the construction of a ranch house and

outbuildings, and oil, gas and geothermal steam for the heating of the ranch house and the outbuildings?[3]

Is the free use limited to the original stock raising homesteader, to the land encompassed within the borders of any one patent, or to situations where the land continues to be used for stock raising? What if the original homesteader or a successor in title acquires adjacent and neighboring land, either by permit, lease or in fee? What if the patentee ceases raising stock and converts to the raising of irrigated crops?[4] Does the right terminate when the original homesteader conveys the land to a third person or devises the land to his children or to other beneficiaries at the time of his death? What happens to the right to free use when the stock raising homesteader converts the land originally patented into a dude ranch and a tourist resort? What happens when the land is subdivided or becomes a town such as Jeffrey City?

What would happen in the all too likely situation of competing claims whereby a rancher wished to utilize gravel deposits and a third party wished to commercially exploit the gravel? Could the third party, by request or attempt at commercial exploitation, cause the gravel, at that moment in time, to become reserved to the United States and thus defeat any claims of the rancher to its use? Assume a rancher stockpiled large quantities of gravel for the future building of a dam to block an intermittent flow stream with

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[3] The Petitioner proclaims that "The homesteader would not acquire any rights to gold mixed with superficial gravel." (Pet. Br. 29). Under the Petitioner's "free use for ranching purposes" theory, until a reserved mineral is susceptible to commercial exploitation, one would be led to believe that the homesteader could use such a deposit unless it were commercially exploitable.

[4] It is well known that technology since 1916 has allowed the development of deep well pump irrigation of vast tracts of the semiarid West. Pursuant to the 1916 Act, lands were not subject to entry which were capable of being irrigated from any known source of water supply. 43 U.S.C. § 292 (repealed 1976).

a view toward creating a stock pond with a capacity of several acre-feet. Could a third party commercially exploit the gravel so stockpiled? Would it make a difference if the gravel were in place and not stockpiled? Would the rancher have a Fifth Amendment claim upon being deprived of his entitlement without just compensation?

Sand and gravel are concededly the most common surface constituents in much SRHA land and often comprise the soil, itself. If a common surface constituent such as gravel susceptible to commercial exploitation becomes a reserved mineral at the time it becomes so susceptible,[5] logic would dictate that any other constituent of the soil, and even the soil, itself, would likewise become a reserved mineral when susceptible to commercial exploitation. The confrontation between a rancher thinking he "owns" the soil and a developer seeking land fill or top soil can be envisaged.

Thus, the government is urging a position that would leave the patent holder and his successors in interest with but a mere surface use grant, terminable by the government at such point in time as the common surface constituent becomes susceptible to commercial exploitation.

Any rule that gravel, a common surface constituent, becomes a reserved mineral upon a determination that a deposit is or was susceptible to commercial exploitation would make for an administrative nightmare and lead to chaos in the status of real estate titles. Inasmuch as a great deal of SRHA land is alluvial plain or otherwise is sandy and gravelly, every use of that gravel would have to be scrutinized

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[5] It seems evident that the government is urging a new definition of "valuable mineral" from that set forth in *United States v. Coleman*, 390 U.S. 599 (1968) wherein the Court approved the Secretary of the Interior's test that to qualify as a valuable mineral deposit "it must be shown that the mineral can be 'extracted, removed and marketed at a profit' — the so-called 'marketability test.' " *Id.* at 601. The need for the government to have a new test adopted by the Court in this case is obvious; the subject gravel was not marketed by the Respondent.

on a case by case basis and would need to be appraised and adjudicated for much of 33,000,000 acres. Presumably, it would have to be re-adjudicated depending upon the use successors in interest had in mind.

The government's assertion does not appear, at this time, to be that gravel is a reserved mineral and that a rancher may have free use; the assertion is that gravel only becomes reserved when susceptible to commercial exploitation and that, in 1916, Congress intended definitionally to exclude a rancher's use of gravel from the category of deposits susceptible to commercial exploitation. Thus, if a rancher conveyed land to Western Nuclear who then reconveyed the land to a rancher, the existing gravel deposit on said land presumably would be reserved to the United States only during the ownership period of Western Nuclear.

The questions of who is a rancher and what is a ranching purpose are not easily ascertainable. Western Nuclear owns a ranch and many corporations and entities engage in ranching. Some ranchers are also engaged in mining. There are dude ranches, chicken ranches, avocado ranches and ranches where a combination of commercial pursuits are undertaken which may include stock raising.[6] The prospect of the rules and regulations which the Department of Interior would have to promulgate and the personnel which would have to be hired to administer them for 33,000,000 acres is overwhelming. The shock would be especially acute to the "owners in fee" of the 33,000,000 acres who would be subject to government administration of the surface of "their" land.

If the government's position be assumed correct, a rancher could use a gravel deposit from his SRHA land to build a ranch road. If the rancher then sold the land to one

[6] A multitudinous list of ranching purposes could be recited which may or may not combine stock raising with other endeavors. However, all ranches must be deemed commercial operations unless they are run only as "hobby farms" to the detriment of the taxpayer. I.R.C. § 183.

engaged in another activity, his successor would be prohibited from using the gravel deposit to extend, maintain or improve the road. Such a result is incompatible with traditional notions of equal protection under the law.

Congress, in passing the SRHA, manifestly anticipated successors in interest to SRHA patentees and predicted the development of the West. Congressional interest in stock raising was subordinate to the ultimate Congressional purpose of settling the West. In favorably reporting out the Stock-Raising Homestead Bill, H.R. 15799, the Public Lands Committee in 1914 set forth the following reasons for its recommendation:

> This plan of providing homes is best for the Nation, as a whole, because it tends to increase the supply and at the same time to lower the price of meat, a universal necessity, especially to the laboring classes; and because it affords an outlet to the congested civic and labor centers of our population without driving homeseekers to take advantage of the liberal land laws of Canada. Moreover, the Nation as a unit needs more states like, for instance, Kansas and Iowa, *where each citizen is the sovereign of a portion of the soil,* the owner of his home and not a tenant of some (perhaps) distant landlord, a builder of schools and churches, a voluntary payer of taxes for the support of his local government.
>
> Of course, the homestead plan is best for the individual States of the semiarid West. It takes homes to insure permanent settlers and taxpayers; it takes homes to bring schools and churches; it takes homes to build cities and towns that attract and support laborers and mechanics; population invites railroads, which in turn bring more immigration and capital *to develop the barely touched resources* of this great semiarid West.

H.R. Rep. No. 626, 63d Cong., 2d Sess. 10-11 (1914) (emphasis supplied).[7]

In reporting out the Stock-Raising Homestead Bill two years later (then numbered H.R. 407) in the Sixty-fourth Congress, the committee stated in its report:

> What the West needs is more people, more homes and more property on the tax rolls. Moreover, it is conclusively demonstrated that the settlement of the former large cattle ranges throughout every State in the Union has not only afforded homes and made the land at least one hundred times more valuable than it was in its former native state, and populated regions with prosperous people and built large cities upon tracts that were formerly cattle ranges, but that the settlement of the country has actually increased the number of cattle, and that the cattle are of a better grade than under the old public large range system.
>
> * * *
>
> This bill is directly carrying out the time-honored policy of this Government to use the public domain as far as possible to furnish homes for the citizens of our country . . . .
>
> * * *
>
> This law will mean the settlement of at least one-fourth of all the remaining public domain, outside of the forest reserves, and will add thousands of homes to each of the Western States and put several million acres of land that now appear almost worthless into a productive condition and on to the tax rolls of each of those States.

H.R. Rep. No. 35, 64th Cong., 1st Sess. 14-15 (1916).

[7] In recommending citizen sovereignty of the soil, Congress surely did not intend to destroy that sovereignty by reserving the very substances that constituted much of the soil.

The assertion in the government's brief that Congress intended ranchers to have free use of the gravel and denied such use to the builders of cities and homes and to those who added improvements subject to the tax rolls requires a very parochial interpretation of Congressional intent and is not substantiated by a review of the legislative history.

B. The government's brief confuses the legal requirements for the location of a valuable mineral deposit under the Act of May 10, 1872, 17 Stat. 91, 30 U.S.C. § 22, and the question of whether or not a substance is a mineral in the first instance under the SRHA mineral reservation.

Historically, the test for the locatability of a valuable mineral, applied by both the courts and the Department, was the "prudent man test" as set forth in *Castle v. Womble,* 19 Pub. Lands Dec. 455, 457 (1894). Historically, common materials were not viewed as minerals and not locatable. *Zimmerman v. Brunson,* 39 Pub. Lands Dec. 310 (1910); *Hughes v. Florida,* 42 Pub. Lands Dec. 401 (1913).

In 1929, the Department enunciated a new rule and defined "mineral" to include gravel as locatable under the general mining law if it could be "extracted, removed, and marketed at a profit." *Layman v. Ellis,* 52 Pub. Lands Dec. 714, 721 (1929).

The "prudent man test" was refined by the application of the "marketability test" with respect to nonmetallic minerals of widespread occurrence. The combination of tests requires a deposit to be presently marketable at a profit and presumably was utilized to prevent abuses. *Foster v. Seaton,* 271 F.2d 836, 838 (D.C. Cir. 1959).

The government's brief attempts to relate the concept of present marketability as applied in mining law cases to what the government now characterizes as a "commercial exploitability" test. Yet it certainly does not equate the two. The government contends: "As applied to SRHA lands,

what that test means is that the mineral reservation embraces only deposits of gravel and other mineral materials which are commercially exploitable and would justify a mineral entry." (Pet. Br. 24).

Herein lies the government's confusion. The mining law allows the location of a "valuable mineral." 30 U.S.C. § 22. To be locatable, a substance must be *both* mineral and valuable. The application of the marketability test is appropriate only with respect to the determination of value.

The fact that a substance may be marketed at a profit does not render it mineral in character. For example, peat may be extracted, removed and marketed at a profit, but it is not locatable because it is not a mineral. *United States v. Toole,* 224 F. Supp. 440 (D. Mont. 1963). The application of the test approved in *United States v. Coleman,* 390 U.S. 599 (1968), cannot create a mineral where none existed — even if the test is further modified by the concept of commercial exploitability. Hence, the real inquiry centers on the meaning of the term "other minerals" in the SRHA mineral reservation.

III. SURFACE GRAVEL WAS NOT RESERVED TO THE UNITED STATES WITHIN THE MEANING OF THE RESERVATION OF "COAL AND OTHER MINERALS" AS CONTAINED IN THE PATENT TO THE SUBJECT RPOPERTY.

Inasmuch as the reservation in the patent was required by the enabling legislation, the resolution of this issue requires this Court to determine whether ordinary surface gravel is includable within the meaning of "other minerals" as used in the SRHA.

In construing the mineral reservation provision of the SRHA, this Court should first look to the entire statute. The statute contained provisions dealing with the mechan-

ics by which the Secretary of the Interior was to classify public lands as "stock-raising lands," the definition of "stock-raising lands," and the identity of those entitled to make entry on such lands, as well as the provision for the mineral reservation described above. *See* H.R. Rep. No. 626, *supra* p. 13.

If the mineral reservation is interpreted as being broad enough to include all mineral substances *vis-a-vis* animal or vegetable substances, then patents to be issued under the SRHA would convey only the bunch grasses, the mesquite, the sagebrush, etc. Even an elementary reading of the statute will not support such an interpretation, and the term "minerals" cannot be so broadly construed. *Northern Pacific Railway Co. v. Soderberg*, 188 U.S. 526 (1903). On the other hand, there can be little doubt that the reservation does cover such clearly valuable substances such as precious metals and oil and gas. The issue then is whether ordinary surface gravel is to be included with, or excluded from, the list of minerals to be encompassed by the reservation.

The SRHA provided for patents (rather than leases, permits or licenses) to be granted to settlers. The provisions setting forth the protection granted patentees in the event of mineral development did not provide compensation for damage to the land, but only for damage to crops and permanent improvements. Considering these circumstances, the Congress could not have intended the reservation to include substances of a mineral character which actually comprised the soil of the patented land. Such an intent would have meant that the stock raising homsteader (and his successors), who had been lured to the semiarid West to make a permanent home, would have no permanent rights to the land he had carved out of the wilderness to support himself and his family. A homesteader's interest in his land would have been little more than a leasehold — terminable

at will. The Tenth Circuit's analysis is illuminating and persuasive:

> We assume that ordinary rocks and stones are not minerals within the meaning of the patent's mineral reservation. If such common substances were considered to be included within the mineral reservation, then under all the many patents issued pursuant to the Stock-Raising Homestead Act, the patentees would own only the dirt, and little or nothing more. Such would be at odds with the nature of the terrain in the Rocky Mountain region, where rocks abound. And if ordinary rocks are not reserved minerals, it follows that gravel, a form of fragmented rock, also is not a reserved mineral.

664 F.2d 234, 242 (Pet. App. 19a).

A review of the legislative history demonstrates that rather than intending to provide for rights analogous to grazing leases upon the unappropriated public domain, the Congress did intend to promote permanent settlement.

In the Sixty-third Congress, Second Session, two bills were introduced in the House of Representatives, one, H.R. 9582, was to provide for 640 acre stock raising homesteads on unappropriated public lands in the semiarid West, and the other H.R. 10539, was to provide for grazing leases upon unappropriated public lands in the semiarid West. Both bills were generally intended to increase the stock producing capacity of the Western States, with the Stock-Raising Homestead Bill having the additional purpose of encouraging permanent settlement in a manner similar to the settlement in Western Nebraska which followed passage of the Kinkaid Act, 43 U.S.C. § 224.

Both bills were referred to the House Committee on Public Lands, and hearings on both bills were held on March 3, 4, 5, 6, 10 and 11, 1914. Previously, the committee had re-

ferred H.R. 9582 to the Department of the Interior for comment. On January 30, 1914, First Assistant Secretary Jones submitted the Department's report on the bill and at the same time submitted a Departmental draft of a substitute Stock-Raising Homestead Bill. Later Mr. Jones issued a second report to the committee.

Following receipt of the recommendation of the First Assistant Secretary, and following completion of the hearings, the Public Lands Committee issued its report recommending passage of the departmentally drafted bill, which was identified as H.R. 15799. The leasing bill and the Congressionally drafted homestead bill were not reported out of committee.[8]

Subsequently, H.R. 15799 was approved by the House of Representatives and sent to the Senate. The Congressional session ended before the Senate could take any action on the bill, and it died in the Sixty-third Congress.

In the Sixty-fourth Congress H.R. 15799 was reintroduced in the House of Representatives under Bill No. H.R. 407. Again the bill was referred to the committee on Public Lands, again the committee sought the advice of the Department, again the Department issued a report to the committee, and again the committee issued its favorable report and recommended passage to the full House. The House did indeed pass the bill and sent it to the Senate where, after certain minor amendments, not relevant to the present case, the Senate also passed the bill. Following the submission of the Conference Committee Report, the bill was ultimately passed and became law December 29, 1916.[9]

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[8] Material contained in the preceding several paragraphs dealing with the legislative history in the Sixty-third Congress was obtained from H.R. Rep. No. 626, *supra* p. 13.

[9] The material in the preceding two paragraphs was obtained from H.R. Rep. No. 35, *supra* p. 13, and H.R. Rep. No. 1231, 64th Cong., 1st Sess. (1916).

The legislative history of the SRHA includes some 500-600 transcript pages of committee hearings, three reports to the committee from the Department of the Interior, some 50-60 pages of Congressional Record, the two House Reports cited above, the report of the Conference Committee and one Senate Report.

In the several hundred transcript pages of committee hearings, there are few references to minerals. At no point in the hearings was there any mention of what mineral subtances were of concern and, in fact, the hearing transcripts shed no light on the present dispute whatsoever.

The report to the committee by First Assistant Secretary Jones, dated January 30, 1914, contained the following in reference to minerals and later was incorporated in the committee report of May 6, 1914:

> For the protection of the entrymen, as well as to prevent the entry of land susceptible of irrigation, containing valuable merchantable timber, or principally valuable for purposes other than those expressed in this Act, it is provided that all lands shall, before being subject to entry, be designated by the Secretary of the Interior. All minerals within the land are reserved to the United States, together with the right of qualified persons to prospect upon, locate, and enter such deposits under such restrictions as will prevent the destruction or injury of permanent improvements of the entrymen, or patentees or of crops upon their lands. This provision, like the requirement that the land shall first be designated for entry, will operate to protect the entrymen from protest and contest, either by individuals or the United States, because of character of the land and which would otherwise result in cancellation of entries made. Another reason for the reservation of the minerals is that *that law will induce the entry of lands in those mountainous regions of the*

> *United States where deposits of minerals are known to exist or likely to be found.* To issue unconditional patents for these comparatively large entries under the homestead laws might withdraw immense areas from prospecting and mineral development and without such reservation the disposition of these lands in the mineral country under agricultural laws would be of doubtful advisability.
>
> The farmer-stockman is not seeking and does not desire the minerals, his experience and efforts being in the line of stock raising and farming, *which operations can be carried on without being materially interferred with by the reservation* of minerals and the prospecting for a removal of same from the land.

H.R. Rep. No. 626, *supra* p. 13, at 3. (emphasis supplied).

In his report to the committee dated April 24, 1914, Mr. Jones made no comment concerning the mineral reservation whatsoever. In his report on H.R. 407, on December 15, 1915, Mr. Jones repeated the comments that had been contained in the report of Janary 30, 1914.

Materials such as ordinary surface gravel are relatively limitless and are found virtually everywhere, while valuable minerals such as oil, gas, tin, lead, coal, gold and copper are found in limited, concentrated deposits. It seems unlikely that if ordinary gravel were intended to be reserved, the report would have spoken of prospecting, expressed concern for contests, or expressed concern for settlement in mountainous regions (i.e. areas of some 50 years of metal ore development).

On January 18, 1915, in the Sixty-third Congress, H.R. 15799 was debated by the House of Representatives and passed. Though the bill contained the provision requiring the subject mineral reservation, there were but two minor references to the existence of the provision in that debate.

52 Cong. Rec. 1807, 1810 (1915). There was also a discussion among Respresentatives Hayden, Ferris and Stafford, during a procedural argument concerning whether debate on the bill was appropriate under a suspension of the rules, at which time Mr. Stafford asserted that the existence of the mineral reservation rendered the bill too important to "be considered without the privilege of amendment." 52 Cong. Rec. 1809 (1915).

In the next Congressional Session on January 15, 17 and 18, 1916, the House of Representatives on three occasions resolved itself into a Committee of the Whole House on the State of the Union to consider House Bill 407 for purposes of conducting floor debates.

The floor debate of Janary 15, did not include the topic of the mineral reservation. On January 17, the following colloquy was held between Congressman Ferris of Oklahoma, a member of the Committee on Public Lands, and Congressman Moore of Pennsylvania:

> Mr. MOORE of Pennsylvania. The gentleman is familiar with the public-land laws. I would like to call his attention to section 10 of the bill, which provides —
>
> > That all entries made and patents issued under the provisions of this act shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented—
>
> And so forth.
>
> Mr. FERRIS. That is true.
>
> Mr. MOORE of Pennsylvania. Would that cover the Government's interest in oil lands?
>
> Mr. FERRIS. It would. We believe it would cover every kind of mineral. All kinds of minerals are reserved; and, more than that, it does not apply to timberlands or to

lands susceptible of irrigation of any land that can get water from any known source. It merely gives the settler who is possessed of any pluck an opportunity to go out and take 640 acres and make a home there. The gentleman from Pennsylvania and I rode over it last summer, and if a man can stick on that land and convert it into a prosperous community, as was done under the Kinkaid Act, I say "God speed him on."

Mr. MOORE of Pennsylvania. If any oil should be discovered on these lands later on, the Government's right to that oil would be preserved under this mineral clause, would it?

Mr. FERRIS. Yes; and further, this act authorizes the re-entry upon these lands to extract oil and coal and anything else in the way of minerals that may be on it.

Mr. MOORE of Pennsylvania. The gentleman does not think it necessary to specify oil?

Mr. FERRIS. No. That is a mineral. But I have no objection to it being mentioned specifically if it is at all thought necessary. I feel doubly sure, however, it is not.

Mr. MOORE of Pennsylvania. It has been called to my attention that the word "mineral" would not include oil.

Mr. FERRIS. I do not think it is necessary; but if the gentleman thinks there is any conceivable doubt about it we will put it in, because not a single gentleman from the West who has been urging this legislation wants anybody to be allowed to homestead mineral land. This does not apply to a single acre of land in my own State, and therefore, I have no selfish interest in it. But these gentlemen who are interested in it do not want to homestead mineral land or ordinary homestead land or oil land.

53 Cong. Rec. 1171 (1916).[10]

Certain passages from Mr. Ferris' remarks, isolated from the context of the particular debate in process and from the other overriding concerns of the legislative process in general, have been quoted to lend support to the government's position. When Mr. Ferris' comments are read in perspective, they cannot be so broadly interpreted. To draw the inference suggested by the government would require the interpretation that all substances of a mineral character were to be reserved. Such a conclusion, as stated above, would be unwarranted and illogical.

Again on January 18, the day the House of Representatives passed the bill, the mineral reservation provision of the bill was before the Committee of the Whole House. Mr. Mondell, a Congressman from Wyoming and a person presumably familiar with the nature of the land in the present dispute, made the following comments concerning the nature of the interest to be received by SRHA patentees:

> Mr. FERRIS. Mr. Chairman, on page 7, lines 24 and 25, and on page 8 this law is made subject to all of the three surface-entry bills that we have passed, and those three laws provide for damage and everything else.
>
> Mr. MONDELL. Where is that?
>
> Mr. FERRIS. On page 7, lines 24 and 25:
>
> > The coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal.

[10] Mr. Moore's questioning appears to have prompted a certain irritation and caused Mr. Ferris' responses to be overstated in a somewhat cryptic manner as an outgrowth of his exasperation at Mr. Moore's apparent lack of knowledge of public land law. *See* 53 Cong. Rec. 1170 (1916). It was well established law at the time of the debate that oil and gas were regarded as minerals by both the Land Department and the courts. *Burke v. Southern Pac. R.R. Co.*, 234 U.S. 669, 678 n. 1 (1914).

> Mr. MONDELL. Those are not the so-called limited-entry laws, affecting the limited entryman, but the laws affecting the miner.
>
> Mr. FERRIS. The three surface-entry acts already passed. They are the laws already referred to.
>
> Mr. MONDELL. The gentleman is entirely mistaken, and, further, I wish he would not call the laws he refers to surface-entry laws, for they are not. They convey fee titles. *They give the owner much more than the surface;* they give him all except the body of the reserved mineral.

53 Cong. Rec. 1233-34 (1916) (emphasis supplied).

The Senate Report is silent as to the meaning of the mineral reservation, as is the Conference Committee Report.

In reporting out H.R. 15799 in 1914 and in reporting out H.R. 407 in 1916, the Public Lands Committee made the following statements concerning the effect of separating the mineral estate from the surface estate:

> It appeared to your committee that many hundreds of thousands of acres of the lands of the character designated under this bill contain coal and other minerals, the surface of which is valuable for stock-raising purposes. The purpose of section 11 is to limit the operation of this bill strictly to the surface of the lands described and to reserve to the United States the ownership and the right to dispose of all minerals *underlying the surface thereof.* This section also provides a method for the joint use of the surface of the land by the entrymen of the surface thereof and the person who shall acquire from the United States the right to prospect, enter, extract and remove all minerals that may *underlie such land,* this method to be under the direction of the Secretary of the Interior under such rules and regulations as he may prescribe.

H.R. Rep. No. 626, *supra* p. 13, at 15, and H.R. Rep. No. 35, *supra* p. 13, at 18 (emphasis supplied).

If ordinary surface gravel were to have been reserved, the committee would not have suggested that the bill provide a method for "joint use" nor would the committee have spoken of minerals that "underlie the land" or that were found "underlying the surface."

From the time of the Revolution, the Congress had followed a policy of encouraging the settlement and the development of the public domain. This policy can be seen in enactments dealing with bounty lands for veterans of the Continental Army, homestead entries (including the SRHA), development of the Nation's mineral resources, land grants to the states, and land grants for the purposes of encouraging the construction of railroads.

Early during the process, the Congress came to recognize a distinction between land valuable for its mineral content and other land. *See generally,* the historical review of public land legislation set forth by Justice Van Devanter in *United States v. Sweet,* 245 U.S. 563 (1918), and by Justice Rehnquist in *Leo Sheep Co. v. United States,* 440 U.S. 668 (1979).

Throughout most of the history of public land legislation, land valuable for its mineral content was excepted from the coverage of legislation designed for the disposal of public land generally in order to give recognition to the different measures of value in public land. In short, the Congress attempted to avoid granting mineral wealth for nonmineral purposes.

The risk of misclassification and the recognition that the same land may be valuable for both its surface uses and its mineral content eventually led the Congress to utilize the device of separating surface interests from mineral interests in the same piece of land, which concept was incorporated into the Act of March 3, 1909. This act was soon

followed by others incorporating the same concept in 1910, 1912, 1914 and ultimately by the SRHA in 1916. *See generally*, the historical development as described in *United States v. Union Oil Co. of California*, 549 F.2d 1271 (9th Cir.), *cert. denied*, 434 U.S. 930 (1977).

In this entire history of public land legislation, nowhere has ordinary gravel been treated as a mineral.

The first time that the Congress specifically dealt with gravel on the public domain was in the consideration of H.R. 2697, a House Bill for the "Disposal of Certain Materials on Public Lands . . . ." On December 7, 1943, Mr. Hatch from the Committee on Public Lands and Surveys in his Senate Report accompanying H.R. 2697, gave the following "EXPLANATION OF THE BILL":

> With limited exceptions, sand, gravel, earth, common rock, timber, and other natural materials and resources on the public domain have not been made subject to disposal by law. Although these products are relatively less valuable than mineral deposits now subject to disposal under the mining and mineral leasing laws, the demand for them is increasing and many of them are needed in connection with the prosecution of the war.

S. Rep. No. 596, 78th Cong., 1st Sess. 1 (1943).

A letter from Harold L. Ickes, Secretary of the Interior, was also set forth in the Report which, in pertinent part, stated:

> This Department receives many requests for permission to remove from the public lands materials or resources, including sand, stone, gravel, and timber the disposal of which is not expressly authorized by law. While section 453 of the Revised Statutes (43 U.S.C., sec. 2) vests in the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, broad administrative powers over the public lands, it is deemed advis-

> able, nevertheless, to secure express statutory authority to provide for the disposals.

S. Rep. No. 596, *supra* p. 26, at 2.

The Congress and the Secretary of the Interior had concluded that sand, gravel, earth, common rock, timber and other natural materials and resources were not subject to disposal by law.

H.R. 2697 was approved by the Congress September 27, 1944, and stated that:

> The Secretary of the Interior, under such rules as he may prescribe, may dispose of sand, stone, gravel, vegetation, and timber or other forest products, on public lands of the United States which are under his exclusive jurisdiction, if the disposal of such materials is not otherwise expressly authorized by law and if such disposal would not be detrimental to the public interest.

Act of September 27, 1944, Pub. L. No. 78-429, 58 Stat. 745 (1944).[11]

The Congress, Secretary Ickes and Senator Hatch all characterized gravel as a material. Such characterization cannot be attributed to imprecision of language. The substances set forth were known not to be mineral and therefore were referred to as materials and resources. If gravel had been regarded as a mineral, lands containing it would have been subject to mineral entry and gravel would not need to have been specifically included in the legislation.

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[11] Because deposits of materials having a peculiar property or special characteristic were regarded as mineral, *Zimmerman*, 39 Pub. Lands Dec. at 312, the Act of 1944 continued to allow mineral entry as "otherwise expressly authorized by law." The Materials Act of 1947 and the Surface Resources Act of 1955 continued to specifically except materials having a property which gives them "distinct and special value" which could still be the basis for location of claims thereafter. *Hallenbeck v. Kleppe*, 590 F.2d 852, 856 n. 4 (10th Cir. 1979).

The Act of 1944 was temporary authorization during the war and expired on December 31, 1946. During 1947, the Congress sought to implement, "in the form of permanent legislation, authority to dispose of materials on the public lands substantially similar to the . . . Act of September 27, 1944." S. Rep. No. 204, 80th Cong., 1st Sess. 1 (1947).

The Materials Act was approved July 31, 1947, and provided:

> The Secretary of the Interior, under such rules and regulations as he may prescribe, may dispose of materials including but not limited to sand, stone, gravel, yucca, manzanita, mesquite, cactus, common clay, and timber or other forest products, on public lands of the United States . . . .

61 Stat. 681.

The Senate Committee on Public Lands Report made mention of the fact that "The Department of the Interior submitted and recommended a bill which is practically identical with this proposed legislation, with the exception that it provided also for the disposal of resources and vegetation. It was the view of the committee that the terms 'resources' and 'vegetation' were too general and should not be included in a bill of this kind, ..." S. Rep. No. 204, *supra*.

It is evident that the consistent use of the term "material" was intended as a term of art to describe non-mineral substances.

When the Materials Act of 1947 was amended, in conjunction with the passage of the Surface Resources Act of 1955, Congress adopted a system of dual classification for materials that would accommodate the Department's desire to include additional substances. Mineral materials were distinguished from vegetative materials. Under the amended act, the surface resources of pumice, pumicite and cinders were added to the materials for which the 1947 Act granted disposal authority. 30 U.S.C. § 601 (Pet. App. 72a-73a).

Both the Congress and the Department defined gravel as a material. Later, Congress divided materials into two categories: vegetative materials and mineral materials. 30 U.S.C. § 601 (Pet. App. 73a). The government would now have us believe that the word "material" is superfluous and that gravel is a mineral. Such a quantum leap to arrive at a new definition is unwarranted.

The history of public land legislation simply does not support the government's position; neither does the subsequent action of the Department of the Interior.

The SRHA mandated disposal of the reserved minerals "in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal."

The Department of the Interior promulgated regulations covering materials sales under the Acts of 1947 and 1955, the only laws in force disposing of gravel in 1975. Among the regulations which the Department has promulgated is the following:

> Mineral material disposals may not be made under the Act from Public land on which: (1) There are valid existing claims to the land by settlement, entry or similar rights obtained under the public land laws; . . . .

43 C.F.R. 3601.1.

The very existence of this regulation suggests that at least as late as June 13, 1970 (the date the regulation was published at 35 F.R. 9728), the Department of the Interior was of the opinion that the substances defined as mineral materials under the Acts of 1947 and 1955, were not reserved minerals. To conclude otherwise would impute to the Department of the Interior a clear violation of the disposal provisions of the SRHA. If, on the other hand, ordinary gravel is not a reserved mineral, the regulation is consistent with the SRHA and the Acts of 1947 and 1955.

As the district court observed, the Department's regulation is consistent with its history of behavior covering several decades in which the Bureau of Land Management, at least in Wyoming, never asserted governmental ownership of ordinary gravel.

> It should be noted at this point that the BLM has never followed these decisions with consistency. It appears that it was not until 1975 that the Wyoming State office of the BLM attempted to be paid for the removal of gravel from patented surface estates. Until that time, it was the practice of the Wyoming Highway Department, construction companies, and the ranchers owning the surface estate to treat the gravel as part of the surface estate, the gravel being sold or used by the rancher *with the approval of the BLM*.

475 F. Supp. at 660 (Pet. App. 32a-33a) (emphasis supplied).

At this late date, the Department of the Interior is in no position to change its interpretation and to invent a new policy.[12] Its prior actions have caused the population generally, and Western Nuclear in particular, to conclude that gravel was not a reserved mineral.

> This Court had traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations . . . .

Leo Sheep Co., 440 U.S. at 687 (citations omitted).

The Congress intended to separate the mineral estate from the surface estate. *Skeen v. Lynch*, 48 F.2d 1044,1046 (10th Cir. 1931). Such separation of estates was a recent de-

[12] *See generally* discussion in *Andrus v. Shell Oil Co.*, 446 U.S. 657 (1980) regarding the Court's rejection of the notion that the Department applied a "present marketability" requirement in 1927 with respect to oil shale claims and that it could not later reverse direction. *Dennis v. Utah*, 51 Pub. Lands Dec. 229 (1925); *Freeman v. Summers*, 52 Pub. Lands Dec. 201 (1927).

velopment in public land law, but not in the law generally. By 1916 there was a developing body of law dealing with the legal effect of separating the mineral estate from the nonmineral estate.

In construing the mineral lands exception in the grant to the Southern Pacific Railroad under the Act of July 27, 1866, this Court had occasion to review and discuss the meaning of the term "mineral" as employed by Congress at some length, and in so doing this Court observed that "doubtless the ordinary and popular signification of the term was intended." *Burke v. Southern Pacific Railroad Co.*, 234 U.S. 669, 676 (1914), and that the Congress "was dealing with a practical subject in a practical way, and we think it used the words 'mineral lands,' and intended that they should be applied in their ordinary and popular sense." *Id.* at 679.

If the ordinary and popular meaning of the words "other minerals" *excluded ordinary gravel,* ordinary gravel was not reserved. The issue is not one of resolving doubts in favor of the government, but rather one of statutory construction to give effect to the intent of Congress. *Leo Sheep Co.*, 440 U.S. at 682-83.

In analyzing the ordinary and popular meaning of the words, one starts with the premise: "Even where there is related federal legislation in an area, as is true in this instance, it must be remembered that 'Congress acts *** against the background of the total *corpus juris* of the states ****' " *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966) (citation omitted).

Attached to Respondent's brief in the district court was an Appendix containing brief synopses of some 65 cases decided under the common law of some 30 different states, all dealing with the meaning of the term "minerals," or similar general terms. A similar analysis was the subject of a lengthy review of the legal meaning of such terms in

Reeves, *The Meaning of the Word "Minerals"*, 54 N.D. L. Rev. 419 (1978), *reprinted in* 16 Pub. Land & Resources L. Dig. 10 (1979).

In considering the great variety of factual circumstances involved in the cases, the great number of analyses distinguishing between public and private grants or reservations, and the plethora of rules of interpretation, the courts, in deciding cases under the dictates of the common law, have uniformly held that gravel is not included within the meaning of the terms "mineral," "minerals" or "other minerals," absent specific reference or special circumstances. Hence, insofar as the "ordinary and popular sense" of the term "mineral" can be gleaned from the common law, gravel is not included.

A review of the cases involving the interests of the United States and several cases decided under statutes of the United States leads to the same conclusion.

United States v. Aitken, 25 Phillipine Reports 7 (1913) is the only court case found prior to 1916 which specifically dealt with gravel in relation to the general mining laws. The *Aitken* Court held that gravel was not a mineral and in so holding stated:

> The United States Land Department, whose decisions on the subject are recognized as of quasi judicial authority, announced the rule many years ago as follows:
>
> > Whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantities and quality to render the land sought to be patented more valuable on this account than for the purpose of agriculture, should be treated by the office as coming within the purview of the Mining Act of May 10, 1872. (Circular Instructions, July 15, 1873.)

> The Department has relied upon this definition many times in the course of its administration of the mining laws. During this time the definition has met with neither legislative nor judicial disapproval, and it consequently is deserving of great weight as an interpretation of the law by the executive department of the Government. Indeed, of all the definitions to be found, it is probably the least misleading, for the reason that "mineral" in a legal sense is no longer bound up in the etymology of the word, and the only method of determining its scope is to ascertain what is included within it by legal authorities.
>
> Assuming that the gravel deposits which the appellees seek to locate could be worked at a profit, it might appear that commercial gravel would fall within the scope of the above definitions. If, however, an examination be made of the individual adjudicated cases and decisions of the United States Land Department, upon which these general definitions of the term "mineral" are based, it will be found that commercial gravel was not a factor in forming them, and that it has never been considered as a mineral. It is as completely excluded from the legal definition of the terms by the silence of the books on the subject as it is eliminated from any technical discussion of the subject by the failure to consider it at all. Nor can such exclusion be attributed to ignorance of its existence, as has been the case with certain minerals which scientific investigation has but recently discovered, and whose discovery has necessitated widening the meaning of the term "mineral" so as to include them. Commercial gravel and its uses, at least for roadmaking and the like, have been known from time immemorial.

Id. at 15-16.

The foregoing is persuasive as being the only mining law case dealing specifically with gravel which was decided by

a court, relying upon administrative decisions then in effect, wherein the decision was rendered just prior to passage of the SRHA.

The decisions under the mining laws since *Layman*, 52 Pub. Lands Dec. 714 are not particularly helpful in resolving the present issue. Only two cases may have considered whether or not gravel is a mineral. Those decisions were rendered by the same court and reached contrary results.

In *Anchorage Sand & Gravel Co. v. Shubert*, 114 F. Supp. 436 (D. Alaska 1953) (*aff'd on other grounds*, 224 F.2d 663 (9th Cir. 1955)), the district court criticized *Layman*, and relied on *Zimmerman*, in its ruling "that sand and gravel are not minerals . . . ." 114 F. Supp. at 438. In the other Alaska District Court case, the court found that "[s]and and gravel of the type sought to be located by the defendants is relatively scarce in Alaska," and ruled that sand and gravel were locatable minerals under the mining laws. *United States v. Schaub*, 163 F. Supp. 875, 877 (D. Alaska 1958).

The other cases, including the limited roster cited by the government (Pet. Br. 35), are only concerned with the application of the marketability test. Those cases did not address the question of whether gravel was a mineral, but rather, focused on whether it was valuable.

A recent example cited by the government is *Hallenbeck v. Kleppe*, 590 F.2d 852 (10th Cir. 1979). Therein, the Tenth Circuit followed the marketability test approved in *Coleman*, 390 U.S. 599. The same court, in ruling that Respondent's gravel deposit in the instant case was not reserved pursuant to the SRHA mineral reservation, did not discuss the application of the marketability test since the principal issue was *not* one of whether the sand and gravel deposits were "valuable."

An additional category of cases exist wherein the United States was a party. These cases may be characterized, perhaps, as setting forth the rule of "federal common law" as to

whether common surface constituents are minerals in a general mineral reservation.

Bumpus v. United States, 325 F.2d 264 (10th Cir. 1963), was a condemnation case. The Declaration of Taking in part provided, as to the relevant tract, that the "fee simple title . . . reserving to the owner or owners of the subsurface estate . . . all oil, gas and *other minerals* under said land . . . ." *Id.* at 265 (emphasis supplied). Following the completion of the condemnation proceedings, Mrs. Bumpus, the owner of the mineral estate, "entered the land for the purpose of mining and removing gravel." *Id.* at 265. The government sought to halt the gravel operations. The court held gravel to be part of the surface estate and not a reserved mineral.

In *Cumberland Mineral Co. v. United States*, 513 F.2d 1399 (Ct. Cl. 1975), the court considered a mineral reservation contained in a private grant to the United States. The case was in the nature of an inverse condemnation proceeding wherein plaintiff brought action for certain sums representing the value of clay and sandstone which the United States had taken from certain land in Kentucky and used in the construction of a dam. Some 35 or 40 years before the case arose, the then owner had conveyed the land to the United States reserving to itself the "mineral, oil, and gas, in, upon or under" the land.

In reaching its decision that the surface deposits of clay and sandstone were not reserved minerals, the court said:

> Rocks are mixtures and, therefore, are outside the mineral category. Sandstone is a sedimentary rock. Shale and limestone are two other types of sedimentary rock. Clay is a soil deposit that it (sic) derived from the decomposition of rock, principally shale. Accordingly, neither sandstone (a rock) nor clay (a de-

> rivitive of rock) is a mineral, in the scientific sense of the term "mineral."
>
> * * *
>
> It is obvious from the facts outlined in the preceding paragraph that if the Plaintiff, as successor in interest to The Castle Craig Coal Company, were the owner of the sandstone and clay in the Castle Craig land and were to exercise its right of ownership *by removing all of these materials, about the only thing that would be left* for the Government *would be a vast chasm,* thus wholly defeating the purpose of the October 14, 1935, transaction whereby the ownership of the Castle Craig land was transferred from The Castle Craig Coal Company to the Government in order that such land could be used by the purchaser for the growing of trees. *Such a situation could not reasonably have been within the contemplation of the parties.*

Id. at 1401-02 (emphasis supplied).

The analyses of these two cases differ in no significant respect from the analyses contained in the state cases decided pursuant to common law. Insofar as the "ordinary and popular sense" of the term "mineral" is defined in "federal common law," gravel is excluded.

The only prior court case addressing the issue before this Court, *State ex rel. State Highway Commission v. Trujillo,* 82 N.M. 694, 487 P.2d 122 (1971), held that ordinary sand and gravel were not reserved to the United States within the meaning of the mineral reservation contained in SRHA patents.

Administrative decisions, as well as judicial decisions may be persuasive authority with respect to a resolution of the issue in the present case. However, the government's reliance upon prior administrative rulings is specious for ignoring *Zimmerman v. Brunson,* 39 Pub. Lands Dec. 310,

and asserting that *Layman v. Ellis*, 52 Pub. Lands Dec. 714, should be controlling.

Zimmerman, involved a contest before the land office seeking to set aside or cancel the homestead entry of one Brunson on the grounds that, at least a portion of the land entered by Brunson was mineral land, and as such, was more valuable for its deposits of sand and gravel than for its agricultural development. Secretary Ballinger held that the existence of gravel deposits did not cause the land to be classified as mineral and be excludable from homestead entry for the reasons that:

> A search of the standard American authorities has failed to disclose a single one which classifies a deposit such as claimed in this case as mineral, nor is the Department aware of any application to purchase such a deposit under the mining laws. This, taken into consideration with the further fact that deposits of sand and gravel occur with considerable frequency in the public domain, points rather to a general understanding that such deposits, unless they possess a peculiar property or characteristic giving them a special value, were not to be regarded as mineral.
>
> From the above resume, it follows that the Department, *in the absence of specific legislation by Congress*, will refuse to classify as mineral land containing a deposit of material not recognized by standard authorities as such, whose sole use is for general building purposes, and whose chief value is its proximity to a town or city, in contradistinction to the numerous other like deposits of the same character in the public domain.

Zimmerman, 39 Pub. Lands Dec. at 312-13 (emphasis supplied).

An administrative decision shortly thereafter cited *Zimmerman*, with approval. First Assistant Secretary Jones

wrote the opinion in *Hughes v. Florida*, 42 Pub. Lands Dec. 401 (1913), and ruled that:

> The Department does not concur with the contention that this deposit is a mineral within the meaning of the general mining laws. It presents features greatly similar to the deposits of sand and gravel considered in the case of *Zimmerman v. Brunson* (citation omitted).
>
> * * *
>
> In harmony with that holding, the deposit of shell rock here involved cannot be held a mineral under the general mining laws.

Id. at 403-04.

This was undoubtedly the same First Assistant Secretary Jones who drafted the Land Department's report to the House Committee on Public Lands less than six months after his decision in *Hughes*. Mr. Jones, on behalf of the Department, also submitted a substitute bill of the SRHA, which the committee adopted. *See* discussion *supra* pp. 18-20.

These decisions were rendered just prior to the enactment of the SRHA. The Land Department had ruled that gravel was not a mineral under the general mining laws then extant. The Congress is presumed to have been aware of the then existing administrative decisions concerning the subject and could not have intended gravel to be a reserved mineral. The presumption is almost irrebuttable given the personnel involved and the sequence of events.

In spite of the absence of "specific legislation by Congress," the decision in *Layman*, some 19 years after *Zimmerman*, and some 13 years following the passage of the SRHA, cancelled a portion of a homestead entry on the grounds that a sand and gravel deposit rendered a portion of the land mineral in character.

Commencing with *Layman*, the Department, *through its own administrative decisions*, began to classify sand and gravel deposits as minerals, and allowed such deposits to be located if the marketability test were met. This policy created unintended problems in the administration of the public lands. Individuals were staking mining claims on land containing gravel deposits in order to obtain land patents. In reality, ownership was sought not for mineral value, but for other purposes such as fishing camps and cabin sites. *United States v. Coleman*, 390 U.S. at 604; H.R. Rep. No. 730, 84th Cong., 1st Sess., *reprinted in* 1955 U.S. Code Cong. & Ad. News 2474-95.

Congress had to step in and correct the abuse which the Departmental decisions had allowed and sand and gravel was removed from the coverage of the mining laws. Congress reaffirmed that gravel was not a mineral.

The government additionally relies upon the decision in *United States v. Union Oil Co. of California*, 549 F.2d 1271, to support its proposition that the SRHA mineral reservation was all encompassing. The court of appeals relied, in part, upon the doctrine of *ejusdem generis* as applied to energy and fuel resources. The application of that doctrine appeared particularly persuasive to the court as it reviewed the legislative forerunners to the SRHA, and because the SRHA enumerated coal as a reserved substance. The fuel or energy classification may be too narrow. The analysis more appropriately could have concentrated on substances having peculiar properties or special and distinct value. In either situation, the result would have been similar. Geothermal steam, in contrast to ordinary surface gravel, is one of a class of substances having special and distinct value.

The court of appeals was not only dealing with a substance of a separate generic class, but in a legal context, was also confronting a new substance. Such a quandry had

been discussed by a court years before with respect to a substance "whose discovery has necessitated the widening of the meaning of the term 'mineral' so as to include [it]." *Aitken*, 25 Phillipine Reports at 16. Unlike geothermal steam, gravel and its uses, have been known from "time immemorial."

The language of the decision certainly lends itself to Respondent's contention that the surface and its resources were conveyed to the patentee:

> This review of the legislative history demonstrates that the purposes of the Act were to provide homesteaders with a portion of the public domain sufficient to enable them to support their families by raising livestock, and to reserve *unrelated subsurface resources,* particularly energy sources, for separate disposition. This is not to say that patentees under the act were granted no more than a permit to graze livestock, as under the Taylor Grazing Act, 43 U.S.C. §§ 315 *et seq.* To the contrary, a patentee under the Stock-Raising Homestead Act receives title to all rights in the land not reserved. It does mean, however, that the mineral reservation is to be read broadly in light of the agricultural purpose of the grant itself, and in light of *Congress' equally clear purpose to retain subsurface resources,* particularly sources of energy, for separate disposition and development in the public interest. Geothermal resources contribute nothing to the capacity of the surface estate to sustain livestock. They are depletable subsurface reservoirs of energy, akin to deposits of coal and oil, which it was the particular objective of the reservation clause to retain in public ownership.

Union Oil Co., 549 F.2d at 1279 (emphasis supplied).

Ordinary surface gravel cannot be deemed to be an "unrelated subsurface resource," and *Union Oil* cannot be re-

lied upon for the proposition that ordinary surface gravel was a reserved mineral.[13]

The government stresses the doctrine that nothing passes under a governmental grant by implication. Even if that rule of construction be valid in some circumstances, this Court recently ruled that neither is anything necessarily reserved by implication. The proper rule is to give effect to the intention of the enabling legislation.

> The Government would have us decide this case on the basis of the familiar canon of construction that when grants to federal lands are at issue, any doubts "are resolved for the Government, not against it." *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 617 (1978). But this Court long ago declined to apply this canon in its full vigor to grants under the railroad Acts.
>
> * * *
>
> The Court harmonized the longstanding rule enunciated most recently in *Andrus, supra,* with the doctrine of *Winona* in *United States v. Denver and Rio Grande R. Co.*, 150 U.S. 1, 14, 14 S.Ct. 11, 15-16, 37 L.Ed. 975 (1893), when it said:
>
> > It is undoubtedly, as urged by the plaintiffs in error, the well-settled rule of this court that public grants are construed strictly against the grantees, but they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication . . .

[13] The Taylor Grazing Act of 1934, referred to in the decision, gave entrymen or permittees, including miners, prospectors for minerals and residents the use of timber, stone, gravel, clay, coal and other deposits for purposes consistent with the entry. 43 U.S.C. § 315(d). The government now apparently contends that the SRHA patentee received less of an interest than the permittee or entryman under the Taylor Grazing Act.

> . . . When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a *quasi* public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted.

Leo Sheep Co., 440 U.S. at 682-83.

The above quoted decision affected millions of acres in the West. This Court rejected the government's contention that the United States had reserved easements, by implication, in its grants to the railroads. In that case of first impression, this Court examined the legislative history, the applicable principles of statutory construction, and such decisions as were relevant or persuasive.

A similar examination in the instant case, taking into account the purposes of the SRHA and the circumstances existing at the time of its passage, leads to only one conclusion.

CONCLUSION

The gravel in question is not the property of the United States. The decision of the Tenth Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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Petitioner's Reply Brief

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In the Supreme Court of the United States

OCTOBER TERM, 1982

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

WESTERN NUCLEAR, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondent asserts that the issue whether the 43,000 cubic yards of gravel it mined were commercially exploitable was never decided in this litigation. It also argues that the government has erred in limiting the Stock-Raising Homestead Act's ("SRHA") mineral reservation to commercially exploitable deposits of gravel. Such a limitation, according to respondent, confuses "minerals" with "valuable minerals" and creates difficult enforcement problems. Finally, respondent suggests that the Materials Act of 1947 and its antecedents show that Congress has consistently considered gravel not to be a mineral. Each of these contentions is without merit.

I. THE 43,000 CUBIC YARDS OF GRAVEL MINED BY RESPONDENT WERE COMMERCIALLY EXPLOITABLE

Respondent advances in this Court for the first time the somewhat remarkable contention that "[t]he record is * * * silent as to" the commercial exploitability of the 43,000 cubic yards of gravel whose conversion formed the basis for this action (Resp. Br. 7). It argues that the issue of commercial exploitability was not raised by the government in the district court or the court of appeals (*id.* at 6), and on that basis urges that the writ of certiorari was improvidently granted (*id.* at 8). This contention is frivolous.

The Stock-Raising Homestead Act land in question was acquired by respondent in March of 1975 (Pet. App. 21a). On October 22, 1975 Gary Fletcher of Western Nuclear informed BLM that the land had been purchased specifically for its gravel deposit.[1] The Bureau of Land Management's ("BLM") Appraisal Report on the property concluded that "the highest and best use of the property is for a mineral material (gravel) site" (Pet. App. 51a). The district court explained respondent's decision to purchase the property in these terms (Pet. App. 21a):

> To keep the sides of the shaft [of its uranium mine] from caving in, the company has been

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[1] III R., Memorandum from Geologist, Lander to Area Manager, Lander Resource Area (October 28, 1975). The memorandum is referred to in the opinion of the Interior Board of Land Appeals (Pet. App. 67a n.15), and is part of the record certified and transmitted to this Court. "'III R." refers to volume III of the record in this Court. The documents in volume III are not numbered sequentially, and will be referred to by their captions.

> using concrete to shore the shaft. To date, the shaft is about 1500 feet deep. Western Nuclear's contractor hauled gravel from Lander and Casper[2] to use in the concrete that was mixed in Jeffrey City.
>
> This method of concrete production was very expensive so Western Nuclear began looking for a local source of material.

The BLM Appraisal Report also noted that respondent owns the town of Jeffrey City (where its mill and mine workers live), and that dust problems in the town required that the streets and sidewalks be paved (III R., Appraisal Report 3, 5).[3] The Report further noted respondent's need for road base material for its "ore-haul roads" (*id.* at 1). The 43,000 cubic yards of SRHA gravel mined by respondent were applied to the solution of such problems (Pet. App. 21a).

It does not appear that more gravel has been mined since issuance of the trespass notice by BLM. The Technical Report (attached to the Appraisal Report) on the property indicates, however, that the

> [e]xtent of the deposit could run from 20 acres to 40 acres, thus 270,000 to 500,000 c.y. could be available at this site.
>
> The WN pit appears to be the only alluvial deposit of good quality in the immediate vicinity. * * * For small quantity sales this appears to be

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[2] The BLM Appraisal Report notes that Lander and Casper are about 65 and 85 miles away, respectively, from the sites near Jeffrey City where respondent needed gravel. III R., Appraisal Report 5.

[3] The restaurant and stores in the town were leased on a concession basis (*id.* at 1); the homes were leased or sold to mill and mine workers (*id.* at 3).

> the only readily accessible source * * *. For large quantities (such as those involved in the WN trespass and proposed future use of the site) [the most] viable alternative[] * * * would run 45¢ per yard [more for] produced aggregates of acceptable quality.[4]

Precisely because the reserved mineral was of that quality, and respondent's uses were of the kind described,[5] the BLM initiated this trespass action. The Appraisal Report (at 1; emphasis added) opened with the statement that "The government has taken the position that the *saleable* reserved mineral, gravel, has been processed and converted to a private use without benefit of a material sale—a trespass." The Report computed the damages from the trespass on the basis of the royalty value (the value of the gravel in place (Pet. App. 66a n.13)) of the gravel taken. The Report noted that "[t]here are a number of gravel operators working the area with resulting market data available" (III R., Appraisal Report 5). It concluded, after a study of comparable sales, that the fair market value of gravel in place in the relevant market was "between 25¢ per cubic yard and

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[4] III R., Technical Report on Western Nuclear Trespass Sand and Gravel Pit and Comparables by T.W. Holland, Geologist, Division of Resources 2. The Technical Report is referred to in the opinion of the Interior Board of Land Appeals (Pet. App. 51a).

[5] A BLM memorandum concerning "Trespass Meeting with Western Nuclear 3/15/76" (III R.) notes that "Jeffrey City is at present a company owned community. It is expected that Western Nuclear in the future, will convert it to a normal publically controlled community. If this had been the case, we would have been more than willing to supply a Free Use Permit for the materials that were used in the city streets."

50¢ per cubic yard with subject falling on the lower end of the scale. * * * [I]t is my opinion that the royalty for subject site is 30¢ per cubic yard," a total of approximately $13,000 (*id.* at 8).[6]

Respondent contested this determination of fair market value before the Interior Board of Land Appeals ("IBLA"), arguing that it "lease[d] a similar site from the State of Wyoming and pa[id] only six cents per cubic yard" (Pet. App. 66a). The Board found, however, that the record did not show that that rate was fixed on the basis of current fair market value. It concluded (*id.* at 65a-66a):

> It thus is clear that gravel in a valuable deposit is a mineral reserved to the United States in patents issued under the Stock-Raising Homestead Act.
>
> * * * *
>
> The State Office determination was based upon an appraisal report which considered four sites. The report indicated the royalty rates for materials from those sites, and the sites were compared with the deposit herein concerned on the basis of location, character of the material, access, depth of the material, and thickness of overburden. No comparable evidence was offered by appellant. A hearing will not be ordered in the absence of a specific factual assertion that would show an appraisal is incorrect.

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[6] The district court subsequently ordered that the element of damages should be determined "by the collaboration of" the Wyoming BLM Office and respondent (Pet. App. 40a). Had the trespass been determined to be willful rather than innocent, the gravel would have been appraised at its conversion value ("the price of the gravel as if stockpiled on the site at Jeffrey City") of $107,500 (III R., Appraisal Report 10). See 43 C.F.R. 9239.0-8.

In the district court the Wyoming Stock Growers Association intervened. The Association, which represents the interests of the livestock industry, and many of whose members hold lands patented under the SRHA (Wyoming Stock Growers Association Amicus Br. 1-2), was concerned that an affirmance of the IBLA's decision would mean ranchers could not use gravel on SRHA lands. At a hearing on the Association's motion for a new trial the government stated:

> What the United States is concerned about are commercial gravel operations. The United States * * * do[es] not see how a commercial gravel operation in any way, shape or form lends itself to helping the rancher. All it does is lend[] itself to helping the mineral company or whoever happens to * * * have a commercial operation. In fact, we would think it would take the land out of the ranch production.
>
> The United States also has no intention of claiming trespass for using sand and gravel on his own land for purposes related to ranching. That is not the intent of the United States.

Br. in Opp. 5a. The government and the intervenors then stipulated that the intervenors

> are not barred by [the district court's judgment] from raising, in the future, issues of fact and law concerning their property rights in sand and gravel patented pursuant to the Stock Raising Homestead Act and the Court may modify its Order to so state. The decision shall not be res judicata of the individual intervenors' rights in other fact situations.

Pet. App. 44a. The district court approved the stipulation and incorporated it in its judgment (*id.* at 43a-44a). The Association did not appeal.

The government's brief in the court of appeals stated that the issue was "[w]hether the district court correctly concluded that the Stock-Raising Homestead Act and its legislative history show that Congress intended to reserve all gravel deposits susceptible to commercial exploitation on lands patented under the Act" (Br. for the Federal Appellees 3). The court of appeals recognized that the issue before it was limited by the decision of the district court regarding the intervenors' claims (Pet. App. 5a-6a n.4).

Thus it is clear both that the gravel deposit at issue here is susceptible to commercial exploitation, and that the government throughout this litigation has limited its claim to deposits of that nature. Respondent asserts (Resp. Br. 8) that it nevertheless did not trespass on the government's reserved interest because it "did not sell gravel." That is true but irrelevant; it is an assertion that can be made by any end-user of reserved minerals. The issue is whether respondent, which wanted to use "gravel to further its own commercial operations" (Pet. App. 3a), should have purchased this gravel from the government rather than from its predecessor SRHA patentee. As we emphasized in our opening brief, the very purpose of the mineral reservation in the SRHA was to permit the separate development of the surface and mineral estates on SRHA lands, as well as to serve the obvious public interest in the collection of revenue (Pet. Br. 10-17). Both those purposes, and the explicit terms of the Act (*id.* at 17-32), make it evident that commercial buyers and users of reserved minerals may acquire the rights they desire only from the government.

II. THE GOVERNMENT'S SRHA MINERAL RESERVATION IS A RESERVATION OF COMMERCIALLY EXPLOITABLE MINERAL DEPOSITS

Respondent also argues that the government has erred in limiting its mineral reservation to commercially exploitable deposits of gravel (Resp. Br. 8-15). Respondent contends that such a limitation would render the reservation uncertain in scope, and lead to difficult problems of line-drawing (*id.* at 8-12). It also states that the government's explanation of the reservation has confused the issue of what is a mineral with the requirements for location of valuable mineral deposits under the Mining Act of 1872, 30 U.S.C. 22 (Resp. Br. 14-15).[7]

The SRHA does not state in explicit terms what *kinds* of substances can qualify as "minerals" within the meaning of the reservation in Section 9, 43 U.S.C. 299. Rather, it denotes them by indicating that the reserved minerals are the substances that can be disposed of under the "mineral land laws" (*ibid.*). Primary among those laws when the SRHA was passed was the Mining Act of 1872, 30 U.S.C. 21 *et seq.*

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[7] Exactly what conclusion respondent would draw from these arguments is unclear. At several points it says that by confusing "mineral" and "valuable mineral," the government has brought within its reservation any substance that is marketable (Resp. Br. 4, 10, 15). That contention is plainly incorrect for, as our opening brief explicitly stated (Pet. Br. 23), "The reservation of minerals in Section 9 was * * * coextensive with the class of minerals which prospectors were allowed to develop under the 'mineral land laws.'"

Elsewhere respondent seems to argue that its use of reserved minerals must be allowed if ranchers are permitted to make free use of gravel on SRHA lands for purposes consistent with the Act; otherwise there will be problems of line-drawing (Resp. Br. 8-12). This argument is unconvincing for the reasons given in text below.

Cases decided under the Mining Act have consistently held that gravel was a mineral within the meaning of that Act (Pet. Br. 32-39).

The separation of mineral and surface estates in the SRHA cannot mean, however, that traces of minerals in any *amounts* on SRHA lands are the property of the United States. For example, aluminum and iron make up 8.1% and 5% respectively of the earth's crust—a fact that suggests their almost inevitable presence, in one compound or another, on lands conveyed under the Act. See 6 *Encyclopaedia Britannica, Macropaedia* 702, Table 1 (1974).

> Because of its chemical activity, aluminum never occurs in the metallic form in nature, but its compounds are present to a greater or lesser extent in almost all rocks, vegetation, and animals. * * *
>
> Aluminum occurs in the original igneous rocks chiefly as feldspar and mica, in the soil derived from them as clay, and upon further weathering as bauxite * * *.
>
> Though aluminum is probably not generally essential for plant and animal life, it accumulates in certain species * * *.

I *Encyclopaedia Britannica, Micropaedia* 281 (1974). Neither aluminum nor iron can be extracted at a profit unless found in concentrations of at least 30% (6 *Encyclopaedia Britannica, Macropaedia, supra,* 706, Table 4). Much the same can be said of minerals such as gravel. Gravel is frequently found along paths once taken by rivers, which cause the characteristic rounding by abrasion in transport. But deposits will vary greatly in extent, in the size of fragments, their coarseness, hardness, concentration, chemical composition, and the amount of over-

burden—to say nothing of the distance from markets, the availability of transportation, the cost of labor for extraction, and so on.

To assert that the SRHA patentee has no claim to the use of any such minerals would, given the frequency of their appearance, make it impossible to build roads or a home on the property, dig ditches and wells, even to grow crops. Such obstacles to use of the land would frustrate one of the very purposes of the SRHA: "to restore and improve the grazing capacity, and therefore the stock-raising and meat-producing capacity, of the semi arid lands of the West, and at the same time to furnish homes thereon to the people." H.R. Rep. No. 626, 63d Cong., 2d Sess. 9 (1914). Neither would it afford any additional encouragement for the discovery and exploitation of mineral resources, and the production of revenue from their disposition, which Congress also sought to promote in passing the Act.

Congress's reservation of the *kinds* of minerals that can be disposed of under the "mineral land laws" thus makes sense only if it refers to *amounts* sufficient to be of value if taken from the homesteader's land. In other words, the reservation is limited of necessity and by the goals of the Act to deposits sufficiently valuable to attract a prudent man under the Mining Act, or to permit the United States to sell [8] or lease [9] its interest.[10] That understanding of

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[8] Under the Materials Act of 1947, 30 U.S.C. 601 *et seq.*

[9] Under the Mineral Lands Leasing Act of 1920, 30 U.S.C. (& Supp. V) 181 *et seq.*

[10] In speaking of "deposits susceptible to commercial exploitation" we refer to deposits sufficiently valuable to be disposed of by such means. The phrase should not, of course,

what Congress did is quite conventional. "The interpretations given to the term 'minerals' used in private conveyancing are generally based upon the principle that a reservation of minerals is considered to indicate an intention by the grantor to reserve all mineral substances *which can be taken from the land.*" 1 *American Law of Mining* § 3.26 at 552 (1982) (emphasis added); Annot., 17 A.L.R. 156 (1922).

Respondent correctly states (Resp. Br. 15) that the Mining Act of 1872 requires "a substance [to] be *both* mineral and valuable" in order to be locatable. It seems to suggest that the government has improperly conflated those two considerations in interpreting the SRHA mineral reservation. But the SRHA incorporates the very distinction emphasized by respondent. It says that the United States reserves an interest only in "minerals" (not peat, for example (Resp. Br. 15), which is not a mineral regardless of its value). And it says that the mineral deposits with which it is concerned are those "subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal." 43 U.S.C. 299. The "mineral land laws" include the Mining Act of 1872, with its requirement that locatable mineral deposits be "valuable." 30 U.S.C. 22. They also include such laws as the Materials Act of 1947, which inevitably apply only to deposits of some value, because they require disposition by sale. 30 U.S.C. 601; 43 C.F.R. Parts 3610-3613.

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be understood to require that one who appropriates minerals must *resell them*. As we stated above, page 7, the issue will often be—as it is here—whether an end-user should have *purchased* them from the government.

Respondent contends that consideration of the value as well as the mineral character of deposits will render administration of the SRHA reservation fatally uncertain. It suggests that a host of questions can arise if the surface estate is conveyed, if gravel is used for purposes unrelated to stock-raising, or if it is used beyond the borders of the SRHA patent (Resp. Br. 9). But transfer of the patentee's interest is irrelevant to enforcement of the Act. The patentee has acquired title to the surface estate, 43 U.S.C. 293, and can transfer his interest like any other estate in land.

Nor does the use of gravel on the patented lands for nonstock-raising purposes present the difficulties respondent imagines. There is, to begin with, no evidence that such use is common. The record in this case indicates that

> [t]he economy of the neighborhood is for agricultural purposes primarily for livestock grazing. The majority of the landowners are considered to be livestock operators operating large units of grazing land[,] * * * these units having been retained by the same families for generations.

III R., Appraisal Report 3. Even where such use occurs, it will generally affect the government's reserved interest not at all (where the deposit has no value if taken from the SRHA property) or very little (because use of even commercially exploitable deposits, if confined to the property, will likely be minimal). Only in the unusual case where the patentee extracts minerals in more than minimal quantities from a commercially valuable deposit, processes them, and appropriates their value in an irretrievable way, is there the kind of development of the mineral estate

that Congress wanted to regulate under the "mineral land laws" (43 U.S.C. 299). Thus, use of gravel deposits for fill, even at a tourist resort or avocado ranch (Resp. Br. 9, 11), may be both necessary because of the character of the land, and desirable because it develops the surface estate in a way Congress wished to encourage. Crushing, washing, and screening gravel to make cement for a hotel complex on the SRHA property, by contrast, is the kind of commercial exploitation of reserved minerals that is not permitted.[11]

On the other hand, use of gravel and other reserved minerals beyond the confines of the SRHA patent is the kind of disposition that Congress intended to subject to the "mineral land laws." 43 U.S.C. 299. Because gravel would not be mined in such cases unless its value exceeded the costs of extraction, processing, and transportation off the property, it is necessarily commercially exploitable.[12] Moreover, use

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[11] To take another example, use of coal by the homesteader for domestic purposes would be permissible. Use of coal deposits to fuel a power plant on the property would not. *Cf. Alabama Coal Lands—Act of Apr. 23, 1912*, 41 Pub. Lands Dec. 32, 33 (1912) ("There is at this time no law which provides for the disposition of the coal in these lands. Persons having homestead entries, pending or perfected, obtain no right to mine coal therefrom, except for their own domestic use * * *"); cf. *Texaco, Inc.*, 59 I.B.L.A. 155 (1981); *Pacific Power & Light Co.*, 45 I.B.L.A. 127, 131-132, 140 (1980).

[12] See note 10, *supra*. The record in this case indicated that respondent's uranium mine was about 12 miles south of Jeffrey City; the gravel was extracted from SRHA lands about one mile north of Jeffrey City. III R., Appraisal Report 1, 6, Site Map, Western Nuclear. Only a portion of Jeffrey City lies within the bounds of the original patent. *Ibid.*; III

off the property does nothing (besides enriching the patentee) to develop the surface estate, whose settlement Congress desired to promote in passing the SRHA. Rather, it is an instance of the multiple use Congress had in mind when it divided the surface and mineral estates (Pet. Br. 13).[13]

Finally, respondent seems to urge that limiting the scope of the government's mineral reservation to commercially exploitable deposits would subject the

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R., Warranty Deed Record No. 53 ("the claim of Arnold A. Erickson has been established * * * for the west half of Section ten in Township twenty-nine north of Range ninety-two west of the Sixth Principal Meridian, Wyoming, containing three hundred twenty acres").

[13] Respondent also argues (Resp. Br. 9-10) that allowing the homesteader to make free use of commercially exploitable deposits could present difficult problems if there were a competing claim by a mineral claimant who had purchased gravel or who sought to locate other minerals on the SRHA land. "Assume a rancher stockpiled large quantities of gravel for the future building of a dam to block an intermittent flow stream with a view toward creating a stock pond with a capacity of several acre-feet. Could a third party commercially exploit the gravel so stockpiled?" (*Ibid.*) The case respondent puts is not unique because it involves gravel. The issue would be the same if the homesteader sought to build an earthen dam by excavating a deposit containing iron ore, or bauxite, or uranium. In such cases the Act specifically says that the surface owner is entitled to recover from the third party the value of "tangible improvements" (43 U.S.C. 299), which in the case put by respondent would presumably mean the costs of excavation. He would also be able to recover for damage "caused to the value of the land for grazing" (30 U.S.C. 54). If he wished to go further and prevent the transfer of reserved minerals to a third party the rancher, like others, is entitled to acquire them in fee by complying with the requirements of the Mining Act or by purchasing mineral materials under the Materials Act (Pet. Br. 13).

surface owner to great uncertainty, because the government's interest would then vary over time (Resp. Br. 9-11). But of course the scope of the reservation is uncertain in any event, because the definition of what is a "mineral" is subject to change. "A reservation of 'all minerals' * * * is not limited to minerals known to exist when the patent is issued, and a statute providing for such a reservation is necessarily subject to administrative or judicial interpretation in order to determine what substances come within the scope of these terms." 1 *American Law of Mining*, *supra*, § 3.26 at 551-552; *United States* v. *Union Oil Co.*, 549 F.2d 1271, 1273-1274 (9th Cir.), cert. denied, 434 U.S. 930 (1977).[14] Perhaps more important, even if the definition of "mineral" were immutably fixed, the surface owner would always be uncertain whether minerals were to be found beneath his land, and whether they would be sought, discovered, and mined. That is not to say, as respondent urges (Resp. Br. 10), that the patentee holds "a mere surface use grant"—only that his interest is subject to invasion in a way characteristic of servient estates. See *Kinney-Coastal Oil Co.* v. *Kieffer*, 277 U.S. 488, 504 (1928).

We emphasized in our opening brief that

> Public land statutes have generally provided that land to be disposed of must be classified as suitable for the particular purposes contemplated by the given statute. Typical of such leg-

[14] See 12 *Encyclopaedia Britannica, Macropaedia* 233 (1974) ("Approximately 50 new species [of minerals] are added each year to the presently known 3,000 types"). Not all of those would be classified as "minerals" under the SRHA, however, since it requires that they first be recognized as such under the "mineral land laws" (43 U.S.C. 299).

> islation is the Stock-Raising Homestead Act of 1916 * * *. Such legislation exhibits a continued pattern of defining the estates to be granted in terms of intended use, a pattern which has become the foundation of multiple use of the public land. The reservation of minerals to the United States should therefore be construed by considering the purposes both of the grant and of the reservation in terms of the use intended. A reservation of minerals should be considered to sever from the surface all mineral substances which can be taken from the soil and which have a separate value.

1 *American Law of Mining*, *supra*, § 3.26 at 552; Pet. Br. 16-17. Considering intended use in defining the estates created by the SRHA will obviously not produce separations as neatly defined as the strata of a layer cake. But that is a different matter from saying that Congress's intent is unclear. It is indisputable that Congress meant to reserve "all mineral substances which can be taken from the soil and which have a separate value." It is also settled that gravel like that mined by respondent is a "mineral" within the meaning of the SRHA, and has "a separate value." Whatever difficult cases Congress's functional division may have created, this is not such a case.

III. CONGRESS HAS EXPRESSLY RECOGNIZED THAT COMMON VARIETIES OF GRAVEL WERE "MINERALS" WITHIN THE MEANING OF THE MINING ACT OF 1872

Respondent argues (Resp. Br. 26-29) that Congress (and the Secretary) have consistently treated "ordinary gravel" as a "material," not a mineral within the purview of the Mining Act of 1872. This contention rests on a misunderstanding of the Mate-

rials Act of 1947, 30 U.S.C. 601 *et seq.*, and of its antecedents.

In support of its argument, respondent points to the Act of Sept. 27, 1944, ch. 416, 58 Stat. 745, which provided temporary authority for "[t]he Secretary * * * [to] dispose of * * * gravel * * * on public lands of the United States * * * if the disposal of such material[] is not otherwise expressly authorized by law * * *." The Senate Report accompanying that bill explained that "[w]ith limited exceptions * * * gravel * * * and other natural materials and resources on the public domain have not been made subject to disposal by law." S. Rep. No. 596, 78th Cong., 1st Sess. 1 (1943). A similar statement was made by Secretary Ickes in a letter set forth in the Report. *Id.* at 2. The authority to dispose of such material was made permanent in the Materials Act of 1947, which stated that (ch. 406, 61 Stat. 681):

> the Secretary of the Interior, under such rules and regulations as he may prescribe, may dispose of materials including but not limited to sand, stone, [and] gravel * * * on public lands of the United States if the disposal of such materials (1) is not otherwise expressly authorized by law, including the United States mining laws * * *.

As the language of the Materials Act (and its predecessor Act of September 27, 1944) make clear, Congress expressly contemplated that some deposits of mineral materials such as gravel *could* be disposed of pursuant to the "United States mining laws." All that either Act demonstrates is the unquestioned proposition that some other deposits could *not* qualify for location under the mining laws. The reasons for

the difference were numerous. Gravel only suitable for use as fill or riprap was not considered "a mineral" under the Mining Act of 1872. *United States* v. *Verdugo & Miller, Inc.*, 37 I.B.L.A. 277, 279 (1978); *United States* v. *Phyllis Bienick and Harry Bienick*, 14 I.B.L.A. 290, 294 (1974). Moreover, in order to qualify as a locatable deposit, a discovery of gravel would have to satisfy the "prudent-man test" and its complementary "marketability test." See *United States* v. *Coleman*, 390 U.S. 599, 602-603 (1968). Those tests would require, among other things, that

> (1) the market must be not merely profitable but sufficiently profitable to attract the efforts of persons of ordinary prudence or, perhaps, the prudent investor; and (2) it must be shown not only that there is a present profitable market, but also that there is a future profitable market.

1 *American Law of Mining*, *supra*, § 4.87 at 710.8(6) (footnotes omitted); *United States* v. *Charleston Stone Products, Inc.*, 9 I.B.L.A. 94, 100, 107-108 (1973), vacated and remanded, Civ. No. LV-2039 BRT (D. Nev. Nov. 8, 1974), aff'd, 553 F.2d 1209 (9th Cir. 1977), rev'd, 436 U.S. 604 (1978). In short, there were undoubtedly numerous deposits of gravel and other mineral materials that could be disposed of—by sale or without charge (61 Stat. 681) —but that would not support a mineral entry under the Mining Act.

When Congress enacted the Common Varieties Act in 1955, 30 U.S.C. 611, it decided that *all* deposits of common varieties of gravel should be disposed of by sale. Consequently it specified that (*ibid.*):

> No deposit of common varieties of sand, stone, [or] gravel * * * shall be deemed a valuable

> mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws * * *.

The Senate Report accompanying the bill stated that it would "[p]rovide that deposits of common varieties of * * * gravel * * * on the public lands, where they are found in widespread abundance, shall be disposed of under the Materials Act of 1947 * * * rather than under the mining law of 1872." S. Rep. No. 554, 84th Cong., 1st Sess. 2 (1955). The comments of the Department of the Interior reproduced in the Report show an identical understanding. *Id.* at 4-5. See also Pet. Br. 36.[15]

CONCLUSION

For the foregoing reasons and the reasons stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

DECEMBER 1982

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[15] Respondent contends that the only kinds of gravel deposits that could be located under the Mining Act of 1872 were those having a "distinct and special value" (Resp. Br. 27, n.11). This contention is erroneous for the reasons stated in our opening brief. Pet. Br. 37-38.

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Amicus Brief

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No. 81-1686

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES G. WATT, Secretary of the Interior, et al., *Petitioners*,

v.

WESTERN NUCLEAR, INC., *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF EKLUTNA, INC. IN SUPPORT OF AFFIRMANCE

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QUESTION PRESENTED

Does the reservation to the United States of "all coal and other minerals" in lands patented under the Stock-Raising Homestead Act, 43 U.S.C. §291., *et. seq.*, include gravel?

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SUMMARY OF ARGUMENT

I. Statement of Interest of *Amicus Curiae*

Eklutna, Inc., an Alaska Native village corporation, was granted the "surface estate" in certain federal lands by the Alaska Native Claims Settlement Act of 1971. Its present and future economic opportunities are directly limited by the definition and extent of the "subsurface estate" in those same lands, which is owned by the United States or by a Native regional corporation. Respondent Western Nuclear, Inc. in the present case stands in a position similar to that of *amicus curiae* regarding its ownership of gravel on lands, the surface estate of which has been patented to it or to its predecessor pursuant to federal law.

II. The Relationship of Common Sand and Gravel to "Surface" Ownership in the Alaska Native Claims Settlement Act

The Alaska Native Claims Settlement Act ("ANCSA") did not define the extent of the "surface estate" or the "subsurface estate" when it required federal lands to be conveyed to Alaska Native village and regional corporations in accordance with the Act. Subsequent litigation in the Ninth Circuit has held that the "subsurface estate" under ANCSA is co-extensive with the "mineral" estate, includes ordinary sand and gravel, and is owned by the Native regional corporations or is retained by the United States, depending upon the terms of the Act. This decision was based not on explicit terms of ANCSA itself nor of other federal land laws, but upon inferences drawn from the nature of the subsurface lands which the Act required the United States to retain, and upon inferences deduced from subsequent federal legislation and legislative report language.

III. The Close Relationship of Ordinary Sand and Gravel to Surface Ownership

The government's trespass action against Western Nuclear, Inc. has erroneously termed the respondent's use of common

gravel from its patented Stock-Raising Homestead Act ("SRHA") lands a "commercial" use of such material, and has introduced a new distinction based on "commercial susceptibility" which is found neither in the SRHA nor in other applicable federal statutes and land grants. The private and commercial use of gravel by the surface owner is inseparable from its use of the surface itself. Without it, the surface owner has little more than a license to occupy its patented lands.

The government's objective in measuring, years after patent has issued, the use of SRHA-patented lands against the presumed purposes of Congress in the land grant is not supported by the SRHA. Such an effort would administratively engraft upon the Act a reverter provision or condition subsequent, requiring SRHA patentees and all subsequent transferees to conform to the "purposes" of Congress in 1916, though no such retained reversionary authority was enacted.

The asserted test of "commercial susceptibility" of gravel as a retained mineral on SRHA lands appears coincident with the "marketability" test for locatable minerals (including uncommon varieties of gravel) under the Mining Law of 1872. The position of the United States raises the distinct possibility of unlimited mining claims, under the 1872 law, for commercial (but otherwise common) gravel on patented SRHA lands and on adjacent public lands, notwithstanding the legal distinctions and prohibitions against such claims which are contained in the Surface Resources (Common Varieties) Act of 1955.

IV. The Need for Consistency in Administration of Federal Land Disposal Statutes

The ability of both *amicus curiae* and respondent Western Nuclear, Inc. to reasonably use and develop former federal lands which they own requires that gravel be determined to be a component of surface estate ownership. Even if the gravel on such lands is not sought to be marketed, but is instead used on the premises, the owner must be able to freely excavate,

transfer, use, and dispose of this gravel if any reasonable and economic development of the surface is to occur. The asserted existence of the government's authority to measure the present use of former federal lands against the past "purposes" of Congress in disposing of such lands, and to define the extent of its retained mineral ownership based upon current market conditions, potentially affects the patentees and their successors in interest under all federal land grants which retained (or placed special conditions upon) the "mineral" interest, or which conveyed the surface and subsurface estates to different grantees. A consistent definition of the status of gravel, and of the authority of the United States to subsequently define that status, will enhance the logic and certainty which is required in the SRHA and other federal land grants, including ANCSA and the Alaska Statehood Act.

V. The Scope of the "Minerals" Provision of the Alaska Statehood Act

Section 6(i) of the Alaska Statehood Act placed special conditions upon the future use and disposition by the State of minerals in lands granted to it by the Act. All minerals were to be leased and not sold, under penalty of an action for forfeiture by the Attorney General. Since statehood in 1959, minerals have not been defined to include gravel in either state law or in federal interpretations of the Statehood Act. Instead, gravel, as a "material", has been freely disposable under state law by sale, and by conveyance as a component of the surface estate. If it should be determined that gravel is a mineral under the SRHA and the Surface Resources (Common Varieties) Act of 1955, the presumed intentions of Congress in placing special conditions upon "minerals" in the Statehood Act in 1959 will be drastically altered. In addition to sales of gravel from state-owned lands, the State of Alaska has patented to private owners the surface estate, including gravel, in more than 21 million acres of land since 1959. All of these conveyances and material sales are potentially subject to the forfeiture provision of Sec. 6(i) of the Statehood Act, if the government's position in the present case is adopted.

VI. Conclusion

The decision of the Tenth Circuit Court of Appeals, which held that gravel was not a mineral under the SRHA, should be upheld.

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No. 81-1686

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JAMES G. WATT, Secretary of the Interior, et al., *Petitioners*,

v.

WESTERN NUCLEAR, INC., *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF EKLUTNA, INC.

Eklutna, Inc., an Alaska Native village corporation incorporated in the State of Alaska pursuant to the requirements of Section 8 of the Alaska Native Claims Settlement Act, P.L. 92-203, 43 U.S.C. §§1601, 1607, and presently in good standing under the laws of Alaska, submits this brief with the written consent of the parties to participate as *amicus curiae* in this case, pursuant to Rule 36.2 of the Court Rules. Such consent is filed concurrent with the submission of this brief.

I.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Eklutna, Inc. (hereinafter "Eklutna") is an Alaska Native village corporation entitled to select and receive conveyance to certain federal public lands pursuant to Sections 11 and 12 of the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §1610, 1611. The property which Eklutna and other Alaska Native village corporations were granted by ANCSA is the "surface estate" in the selected lands (43 U.S.C. §1613(b)), while the "subsurface estate" is to be either conveyed to the appropriate Native regional corporation, or retained by the United States if the land is located within a National Wildlife Refuge or the Naval Petroleum Reserve Numbered 4 (subsequently redesignated the "National Petroleum Reserve—Alaska"). 43 U.S.C. §1613(f). As the recipient and owner of the "surface estate" in federal lands under ANCSA, Eklutna's economic future is linked directly to the "surface estate" in more than 92,160 acres which were granted it by that Act, 43 U.S.C. §1613(a), and to the incidents of ownership which compromise that "surface estate". Previous litigation in the Ninth Circuit Court of Appeals (in which Eklutna participated as *amicus)* has determined that sand and gravel are "subsurface" or "mineral" resources, and are either to be conveyed to the Native regional corporations or retained by the United States under the terms of ANCSA, a conclusion of great negative financial impact to ANCSA village corporations, whose ability to use and develop their surface estate for their economic benefit will be severely constrained. *Chugach Natives, Inc. v. Doyon, Ltd.*, 588 F.2d 723 (1979).

Eklutna submits this brief *amicus curiae* supporting the position of respondent Western Nuclear, Inc., and urging that this Court sustain the decision of the Tenth Circuit in *Western Nuclear, Inc. v. Andrus* 664 F.2d 234 (1981). Eklutna also urges that a consistent standard of predictability, clarity and good faith be applied in the government's administration of the numerous federal land disposal statutes, only one of which,

the Stock-Raising Homestead Act ("SRHA"), 43 U.S.C. §§291-301, is under direct scrutiny in the present action. As *amicus* will demonstrate, other federal land disposal laws, including statutes which directly affect Eklutna such as ANCSA and the Alaska Statehood Act (72 Stat. 339 (1958), 43 U.S.C., note prec. §21), will be implicated, in ways not previously anticipated, by the decision in this case.

II.

THE RELATIONSHIP OF COMMON SAND AND GRAVEL TO "SURFACE" OWNERSHIP IN THE ALASKA NATIVE CLAIMS SETTLEMENT ACT

The Alaska Native Claims Settlement Act distinguished between the "surface" estate of selected federal land (which was to be conveyed to Native village corporations), and the "subsurface" estate (which was to be either retained by the United States, or conveyed to Native regional corporations, depending upon the location of the land involved). 43 U.S.C. §1613. The Act defined neither the term "subsurface" nor "surface." The Ninth Circuit in *Chugach Natives, supra*, determined first that "subsurface estate" was co-extensive with "mineral estate", at p. 728. As a result, interpretation of the scope of the "minerals" reservation under the SRHA in the present case has a demonstrable parallel to the legal extent of the "subsurface estate" under ANCSA.

The court in *Chugach Natives* found that analysis of the 1955 Surface Resources (Common Varieties) Act, 30 U.S.C. §601, *et seq.*, was inconclusive to determine the extent of the "subsurface estate". The court was not persuaded that all "common varieties" listed in the Surface Resources Act were "minerals" comprising the subsurface estate under ANCSA. *Chugach Natives, supra*, p. 728. Despite this doubt regarding the proper definition of "minerals" or "subsurface", the Court of Appeals found, in other documents, sufficient reason for it to determine that common sand and gravel were "subsurface" resources. This documentation included another provi-

sion of ANCSA (the requirement in Sec. 14(f), 43 U.S.C. §1613(f) for retention by the United States of the subsurface under National Wildlife Refuges and the National Petroleum Reserve—Alaska), an opinion letter of the associate Interior solicitor written five years after ANCSA was enacted, and subsequent legislation and legislative report language which raised inferences about the interpretation of ANCSA. *Chugach Natives, supra,* pp. 729-731.

Though they were not directly involved in the *Chugach Natives* litigation, Eklutna and other ANCSA Native villages will face the *stare decisis* effect of the holding in that case in any future litigation over these issues in which they might become involved unless this Court, in its consideration of the issues in the instant case, enunciates a clear definition of the United States' retained mineral interest which will bring consistency and certainty to the interpretation of numerous federal land grants and disposals affecting *amicus curiae*, including ANCSA and the Alaska Statehood Act, *supra.*

III.

THE CLOSE RELATIONSHIP OF ORDINARY SAND AND GRAVEL TO SURFACE OWNERSHIP

The United States has asserted that, under the SRHA, Western Nuclear's extraction of gravel from its patented land constituted a trespass upon the retained federal mineral interest because Western Nuclear was using, for its own purposes, gravel which was susceptible to "commercial" uses.[1] Aside from its "commercial susceptibility", the gravel in question has not been alleged to be unusual, "uncommon", or in any other way unique; only its proximity to Western Nuclear's mining projects in which it was used has made it more useful than other similar gravel located elsewhere. The government has also asserted that a rancher's use of gravel from SRHA

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[1] Br. of Petitioner, p. 4.

lands would not be pursued as a trespass, on the theory that such use was permissible under the law, or as an act of prosecutorial forbearance.[2]

The government's standard of "commercial" susceptibility or use is not found in its statutes or regulations, and thus should not be the proper point of reference upon which this or other cases should turn. In prosecuting as a trespass the use of common surface gravel from patented SRHA lands by the patentee or his successor in interest, the government has confused the claimed existence of "value" with the statutory standard of "uncommonness" contained in the Surface Resources (Common Varieties) Act, *supra*. If an owner of SRHA-patented land uses common gravel from such land for its own purposes, as did Western Nuclear, and does not freely sell the gravel on the open market, such an activity is not the "commercial" use of gravel, whether or not that use is directly related to stock-raising or to other endeavors. Even if such gravel is used for acknowledged "commercial" purposes (i.e., the open marketing of gravel for uses in which the landowner's motivation is simply monetary), the magnitude of the use might change, but the character of the gravel itself has not changed: it remains a ". . . common . . . variet[y] of . . . gravel . . .", disposable by the United States as a "surface" resource, either by patent

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[2] Br. of Petitioner, pp. 24-26; Br. of Respondent in Opposition to Certiorari, Appendix pp. 5a-8a. The government overlooks the fact that ranching, like mining, is a "commercial" enterprise. Nor does its strained application of the SRHA mineral reservation accommodate the likely circumstance of a rancher using gravel for ranching purposes but transporting it from the SRHA premises, or selling it to a fellow rancher, or selling it to the state or county highway department to augment his income. If a SRHA rancher dredges a stock-watering pond, may he sell the gravel thus removed without committing a trespass against the United States? The government's position in this case would require the most minute and laborious examination of the details of thousands of everyday transactions, to determine whether a trespass or a permitted use were occurring in each instance.

or by sale from BLM public lands under the Surface Resources (Common Varieties) Act, *supra.*[3]

If, on the other hand, the gravel in question is truly "uncommon", i.e., it possesses some intrinsic quality or unusual value unique to itself, rather than being attributable to its physical location, then it is clearly locatable as a mining claim under the 1872 Mining Act, 30 U.S.C. 21 *et seq.*, and is a "mineral" reserved to United States in SRHA patents and in other federal land disposals by the terms of the disposal acts themselves. The government, without clear statutory authority, has attempted by administrative artifice to create a middle category of "minerals"—a common variety of gravel which is not locatable as a mining claim due to its lack of intrinsic value, but which is not owned by the surface patentee as a surface resource because it has "commercial" susceptibility (i.e., "value") due to its physical location, a factor which may become evident only years after patent, if at all. Under the goverment's theory, such gravel was, *nunc pro tunc,* reserved to the United States at the time of patent as a non-locatable but valuable "mineral."

This position is both unwise and legally unsound. Because it is not supported by clear statutory authority, it introduces extreme uncertainty into the usual security of a federal patent, and it leaves the surface owner in most cases with little

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[3] Significantly, the government has been unable to state how much gravel has been sold or otherwise disposed of by it from SRHA-patented lands, as distinguished from the quantities disposed of from the federal public lands in which both the surface and subsurface remain in public ownership. Disposals by it from SRHA lands, as Western Nuclear has pointed out, would violate the government's own regulations at 43 C.F.R. 3601.1. The BLM's claimed practice of disposing of gravel from the retained mineral estate of patented SRHA lands seems largely speculative at the present time, though it has possessed this right since 1916, under the government's position in this case.

more than a revocable license to occupy the surface.[4] Application of this theory will permit the United States to retroactively reduce the scope of a federal land disposal many years after Congress had prescribed the terms of disposal and after patents have issued, on the basis of events occurring and values created many years subsequent to patent.

The brief *amicus curiae* of the Wyoming Stock Growers Association and the State of Wyoming in this case has ably set out the development of the surface/minerals distinctions in the common law, and in the relevant decisions of the Department of the Interior both before and after passage of the SRHA.[5] That history will not be repeated in this brief. Eklutna will instead focus on related considerations which affect the interpretation of both the SRHA and subsequent federal land disposal statutes.

It must be recognized that the position of the United States in these circumstances contains significant elements of self-interest. By administratively broadening the scope of the "mineral" or "subsurface" reservation years after the Congressional grant has been enacted and after virtually all patents have issued, the government has retroactively acted to restrict the scope of the grant, thereby directly enhancing its position as seller of the retained "mineral".[6] In *Chugach Natives,*

[4] The inseparable relationship between the surface estate and the sand and gravel which underlies it (and of which it is often composed) was discussed by the District Court for Alaska at p. 866 of its decision in *Aleut Corp. v. Arctic Slope Regional Corp.*, 421 F. Supp. 862 (D. Ct. Ak. 1976); *rev., Chugach Natives, supra.*

[5] Br. of *amici* at pp. 5-9.

[6] The United States had acknowledged, to a limited degree, its direct financial interest in the scope of the retained minerals. Br. of Petitioner at p. 13. Unlike retained locatable minerals, which may be obtained by a claimant under the Mining Act of 1872, 30 U.S.C. §21, *et seq.* without direct financial benefit to the government, leasable retained minerals provide such a benefit. Mineral Lands Leasing Act of 1920, 30 U.S.C. §181. *et seq.* Expansion of the scope of retained "minerals" to include disposable gravel on SRHA lands would obviously enhance the possibility of direct lease proceeds to the United States.

supra, an opinion of the associate Interior solicitor which defined the scope of the "subsurface estate", and which was written six years after passage of ANCSA, influenced the court's decision in that case. *Chugach Natives, supra,* p. 729. Subsequent legislation and legislative report language drafted or sponsored by the Department also influenced the decision, by suggesting a certain position regarding application of the surface-subsurface distinctions in ANCSA, enacted five years previously. *Supra,* p. 730.

In the present litigation, the Department's administrative reversal[7] of its earlier position on common gravel, a position which was consistent with the nearly contemporaneous SRHA and the present position of Western Nuclear,[8] is advanced as evidence of the correct scope of the retained mineral interest under the SRHA. This assertion is made despite the fact that in 1955 Congress was required to rectify serious problems created by the "locatable" nature of common varieties of gravel under the 1929 *Layman* decision, *supra,* by enactment of the Surface Resources (Common Varieties) Act, *supra,* a statute which the petitioner now interprets as an aid in asserting the existence of a category of "common but commercially susceptible" gravel as a retained, valuable "mineral" on lands previously patented.

The inconsistency between the government's present position and the purposes of the Surface Resources (Common Varieties) Act, *supra,* is most apparent in its footnote 21, at p. 36 of its brief, in which it attempts to distinguish *State ex rel. State Hwy. Commission v. Trujillo,* 82 N.M. 694, 487 P.2d 122 (1971) from the present case. The United States asserts,

> . . . The *Trujillo* court based its conclusion on the erroneous supposition that gravel, in order to be a locatable mineral, had to be of a rare or exceptional quality [citing case]. But the proper test is simply

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[7] *Layman v. Ellis,* 52 Pub. Lands Dec. 714 (1929).

[8] *Zimmerman v. Branson,* 39 Pub. Lands Dec. 310 (1910).

> whether such minerals are presently marketable. [Citing cases] . . .

If this is in fact the position of the government, it should also acknowledge the possibility that millions of acres of SRHA-patented lands may suddenly become available for the mineral location of gravel claims under the 1872 Mining Act, *supra*. There appears to be no difference between the "present marketability" test for locatable, "uncommon" gravel and the government's new "commercial susceptibility" test for "common" gravel as a retained mineral on SRHA-patented lands. A determination by BLM of the "commercial susceptibility" of gravel on SRHA-patented lands (particularly if actual use of gravel by an owner, such as Western Nuclear, for non-ranching purposes has occurred) may unavoidably lead to an immediate rush of claim-staking under the 1872 Act on SRHA-patented lands, and on public lands in the vicinity, on the legitimate basis that present marketability has been demonstrated, notwithstanding the "common" character of the gravel under the Surface Resources (Common Varieties) Act and previously-accepted standards.

The inevitable result of the government's claim to minerals which are retained by the United States under the SRHA (and by direct analogy, under other federal land disposals and grants which retain "minerals" or "subsurface") is that the patentee of the surface estate owns little more than the right to occupy the surface, a right subject to definition by the United States if it subsequently determines that common surface gravel has current "commercial" susceptibility. The government's assertion is in essence a covenant or power of reversion engrafted onto the patent which would permit the United States, under the pretext of the retained mineral interest, to examine and restrict the use of patented SRHA land after title has passed from the United States. This assertion is advanced despite the absence of any specific, statutory condition subsequent which would permit the government, many years after patent, to

restrict the surface uses of SRHA lands to those general "purposes" which Congress enunciated as its motivation for enacting the Stock-Raising Homestead Act in 1916. The regularity and certainty of federal patents will be serious compromised if such a result is permitted.

IV.

THE NEED FOR CONSISTENCY IN ADMINISTRATION OF FEDERAL LAND DISPOSAL STATUTES

As explained previously, Eklutna's involvement in the distinction between the "surface estate", which it owns, and the "subsurface estate" or "mineral interest" which the United States either conveyed to Native regional corporations under ANCSA, or retains under national wildlife refuges and the National Petroleum Reserve, 43 U.S.C. §1613, has a negative and potentially devastating impact upon the financial fortunes of ANCSA village corporations. Land conveyances made to these corporations were both to legitimize historic use and occupancy of village sites and lands in the vicinity, and to provide the opportunity for economic self-sufficiency.[9] If a Native village corporation, as patentee of the "surface estate" under ANCSA, is determined in appropriate litigation to own merely a right of occupancy of the surface, it cannot assure its economic future if the common surface gravels which compose its "surface estate" belong either to a Native regional corporation or to the United States. It could not lawfully till the land, for example, or construct a residential subdivision, without trespassing upon the "subsurface" or "mineral" estate owned by others, since the excavation of gravel to provide for drainage, streets, utilities, or residential basements would be necessary. It may not be permitted to apply the removed gravel to the construction of roads or other required improvements, on or off the premises. The standard to be applied to determine whether the common gravel on ANCSA village corporation

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[9] Chugach Natives, *supra*, p. 731; *Alaska Public Easement Defense Fund v. Andrus*, 435 F. Supp. 664 (D. Ct. Ak. 1977).

land is now, or might be, of "commercial" potential, and is thus owned by the United States or by the Native regional corporation, is unstated and potentially limitless. The Congressional purposes of the ANCSA land grants may create irreconcilable conflicts between traditional cultural values and economic self-sufficiency, if the propriety of gravel use on village lands is to be measured by the government's criteria in the present case.

The United States has asserted in the instant case that a rancher's incidental use, on his own ranch, of common gravel advances the "purposes" of the SRHA, and thus will not be prosecuted as a trespass, despite the absence in statute of any distinction between the use of such materials for SRHA-related purposes or for other purposes. The unfettered power of the United States to determine the extent of the mineral reservation in patents by references to the stated "purposes" of numerous prior federal grants, each with differing objectives, will be sanctioned by implication if the decision of the Tenth Circuit Court is reversed.

Given the government's alternative, it would be both desirable and consistent to uphold the circuit court decision, as an important first step in affirming the classification of common surface gravel as a "surface resource" and not as a "mineral" throughout the federal land grant and disposal statutes, unless explicitly indicated otherwise by Congress. Consistent interpretation would eliminate the ambiguous, middle category of gravel lately created not by statute, but by administrative imagination — a variety of gravel which is apparently not locatable under the 1872 Mining Act, 30 U.S.C. §21, *et seq.*, because it is common, but yet is a retained "mineral" because, notwithstanding its ubiquity, it has "value". The consistent application of an accepted definition of the retained "subsurface" or "mineral" estate is desirable for all federal land conveyances incorporating those terms, to assure that a surface patentee owns something more than a revocable occupancy interest. Such a result is most equitable and predictable if it is determined that common surface gravel

is not a retained "mineral" under the federal laws, thus preventing later arbitrary and unanticipated analysis of potential commercial opportunities, and the penalty of trespass or reverter based on the general "purposes" of prior legislation.

V.

THE SCOPE OF THE "MINERALS" PROVISION OF THE ALASKA STATEHOOD ACT

The government's assertion that common surface gravel (or common gravel at any depth) is a retained "mineral" under federal law has an unexamined and grave impact upon the land grants made to the State of Alaska by Congress in the Alaska Statehood Act, *supra*. If Congress determined in 1955 that common varieties of gravel were "minerals" under the Surface Resources (Common Varieties) Act, *supra*, as the petitioners assert, then it may be reasonably presumed that in enacting the Alaska Statehood Act in 1958, Congress was of the same view.

The Alaska Statehood Act granted conveyance of 103,350,000 acres of federal land in fee to the new State of Alaska[10], including both the surface and the mineral estates[11]. Congress placed detailed restrictions upon Alaska's future administration of the mineral estate it received under the Act:

> All grants made or confirmed under this Act shall include mineral deposits. The grants of mineral lands to the State of Alaska under subsections (a) and (b) of this section are made upon the express conditions that *all sales, grants, deeds, or patents for any of the mineral lands so granted shall be subject to and contain a reservation to the State of all of the minerals in the lands so sold, granted, deeded, or patented,* together with the right to prospect for, mine, and

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[10] Sec. 6(a), (b), Alaska Statehood Act, *supra*.

[11] Sec. 6(g), Alaska Statehood Act, *supra*.

> remove the same. *Mineral deposits in such lands shall be subject to lease by the State as the State legislature may direct: Provided, that any lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeited to the United States* by appropriate proceedings instituted by the attorney general for that purpose in the United States District Court for the District of Alaska. Sec. 6(i), Alaska Statehood Act, *supra. [Emphasis supplied].*

Conforming to this provision of federal law, the Alaska Statutes at AS 38.05.125 reserve to the State ". . . all . . . minerals . . .". This statutory reservation is included in ". . . each contract for the sale, lease, or grant of State land and [in] each deed to State land, properties, or interest in State land, . . . ", AS 38.05.125. However, state lands containing sand, gravel, and other common materials are classified as "material lands"[12], and the Director of the Division of Lands is authorized by AS 38.05.110-.120 to sell these materials by negotiation, by sealed bid, or at public auction. He is not required by state law to only lease these lands, as Sec. 6(i) of the Statehood Act would require if gravel is determined to be a "mineral".

Lands patented out of state ownership pursuant to statutory land disposal programs contain the mineral reservation required by AS 38.05.125 and Sec. 6(i) of the Alaska Statehood Act, but do not reserve common "materials" such as sand and gravel, as they have been defined by state law. AS 38.05.365 (19), *supra.* These materials are conveyed, together with the surface estate, to the patentee for whatever necessary or useful

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[12] AS 38.05.365(19) defines "material lands" as follows: " 'timber lands' and 'material lands' mean state lands chiefly valuable for materials, including, but not limited to, sand, stone, gravel, pumice, common clay or timber and other forest products; . . . "

purpose he may determine, governed only by applicable zoning, environmental, or other statutory requirements. Again, if gravel is a "mineral" under federal law, the mineral lease provisions of Sec. 6(i) of the Statehood Act are in direct conflict with state laws, and the potential penalty is an action for forfeiture by the United States Attorney General.

If the government's position (that Congress in the SRHA and in the Surface Resources (Common Varieties) Act determined that common gravel was a mineral) is accepted in this case, every acre of Statehood-Act land conveyed by the State since statehood in 1959 appears in jeopardy of an action for forfeiture to the United States pursuant to the terms of Sec. 6(i) of the Alaska Statehood Act.[13] Under the terms of Sec. 6(i), whether the gravel has commercial potential or whether the patentee has used it for more benign purposes is immaterial, since the mere act of patenting, rather than leasing, the State's "mineral" interest would initiate the potential forfeiture. Certainly Congress could not have intended such an expansive definition of "minerals" in 1955 or 1959. Nor could it have envisioned establishing a legalistic web, either in 1916 with passage of SRHA, or in 1959 with passage of the Alaska Statehood Act, or even in 1971 with passage of ANCSA, in which the government, by later administrative expansion of commonly-accepted definitions, could enlarge the scope of the government's retained mineral interest by examining current values and the uses to which patented lands have been put, thereby placing the certainty of federal patents and the economic livelihood of innumerable patentees in severe jeopardy, for no reason except that the federal purse might be augmented by some undetermined amount at a future date.

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[13] The State has conveyed into private ownership approximately 21,080,000 acres of land subject to the §6(i) forfeiture provision. *Monthly Selection Activity Report*, Div. of Technical Services, Alaska Dept. of Natural Resources (June 30, 1982).

VI.

CONCLUSION

For the reasons stated in this brief, Eklutna, Inc., as *amicus curiae*, urges that this Court affirm the decision of the Tenth Circuit Court of Appeals in *Western Nuclear v. Andrus, supra*, thereby upholding its decision that the mineral estate retained by the United States under the Stock-Raising Homestead Act does not include gravel.

Respectfully submitted this 13th day of August, 1982.

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APPENDIX

Alaska Statutes

Article 4. Disposal of Timber and Materials.

Sec. 38.05.110. *Sale of timber and materials.* The director shall provide for cruises of timber and appraisals or other materials in or upon lands and transmit this data to the commissioner, together with his recommendations with respect to (1) the timber and other materials which should be offered for sale, and (2) the terms of sale of the timber or other materials.

Sec. 38.05.115. *Limitations and conditions of sale.* (a) The commissioner, upon recommendation of the director, shall determine the timber and other materials to be sold, and the limitations, conditions and terms of sale. The limitations, conditions and terms shall include the utilization, development and maintenance of the sustained yield principle, subject to preference among other beneficial uses. The director may negotiate sales of timber or materials without advertisement and on the limitations, conditions, and terms which he considers are in the best interests of the state, subject to the approval of the commissioner. However, not more than 500 M.B.M. or equivalent other measure of timber or more than 25,000 cubic yards of materials may be sold by nonadvertised, negotiated sale to the same purchaser within a one-year period.

(b) Negotiated sales not exceeding 50 M.B.M. or the equivalent other measure of timber or 2,500 cubic yards or materials are exempt from the provisions of AS 34.15.150.

(c) The limitations of this section are not applicable to timber which becomes state property under the provisions of AS 45.50.210-45.50.235.

* * *

Sec. 38.05.120. *Disposal procedure.* Timber and other materials shall be sold either by sealed bids or public auction,

APPENDIX

depending on which method is determined by the commissioner to be in the best interests of the state, to the highest qualified bidder as determined by the director. An aggrieved bidder may appeal to the commissioner within five days after the sale for a review of the director's determination. The sale shall be conducted by the director or his representative, and at the time of sale the successful bidder shall deposit the amount specified in the terms of sale. The means by which the amount of deposit is determined shall be prescribed by appropriate regulation. The director or his representative shall immediately issue a receipt containing a description of the timber or materials purchased, the price bid, and the terms of sale. The receipt shall be acknowledged in writing by the bidder. A contract of sale, on a form approved by the attorney general, shall be signed by the purchaser and, following the approval of the commissioner, the contract shall be signed by the director on behalf of the state. The director, with the approval of the commissioner, may impose conditions, limitations, and terms which he considers necessary and proper to protect the interests of the state. Violation of any provision of this chapter or the terms of the contract of sale subjects the purchaser to appropriate legal action.

Article 5. Reservation of Rights to Alaska.

Sec. 38.05.125. *Reservation.* Each contract for the sale, lease or grant of state land, and each deed to state land, properties or interest in state land, made under AS 38.05.315-38.05.325, 38.05.045-38.05.120, 38.08.010-38.08.120, or 38.50.010-38.50.170 except as provided in AS 38.50.050 is subject to the following reservations: "The party of the first part, Alaska, hereby expressly saves, excepts and reserves out of the grant hereby made, unto itself, its lessees, successors, and assigns forever, all oils, gases, coal, ores, minerals, fissionable materials, geothermal resources, and fossils of every name, kind or description, and which may be in or upon said lands above described, or in any part thereof, and the right to ex-

APPENDIX

plore the same for such oils, gases, coal, ores, minerals, fissionable materials, geothermal resources, and fossils, and it also hereby expressly saves and reserves out of the grant hereby made, unto itself, its or their agents, attorneys, and servants upon said lands, or any part or parts thereof, at any and all times for the purpose of opening, developing, drilling, and working mines or wells on these or other lands and taking out and removing therefrom all such oils, gases, coal, ores, minerals, fissionable materials, geothermal resources, and fossils, and to that end it further expressly reserves out of the grant hereby made, unto itself, its lessees, successors and assigns forever, the right by its or their agents, servants and attorneys at any and all times to erect, construct, maintain, and use all such buildings, machinery, roads, pipelines, powerlines and railroads, sink such shafts, drill such wells, remove such soil, and to remain on said lands or any part thereof for the foregoing purposes and to occupy as much of said lands as may be necessary or convenient for such purposes hereby expressly reserving to itself, its lessees, successors, and assigns, as aforesaid, generally all rights and power in, to, and over said land, whether herein expressed or not, reasonably necessary or convenient to render beneficial and efficient the complete enjoyment of the property and rights hereby expressly reserved.

Article 12. General Provisions.

* * *

Sec. 38.05.365. *Definitions.* In this chapter, unless the context requires,

* * *

(19) "timber lands" and "material lands" mean state lands chiefly valuable for materials, including, but not limited to, sand, stone, gravel, pumice, common clay, or timber and other forest products; . . .

Amicus Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES G. WATT, Secretary of the Interior, et al.,
Petitioners,
v.
WESTERN NUCLEAR, INC.
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF *AMICI* WYOMING STOCK GROWERS ASSOCIATION AND STATE OF WYOMING IN SUPPORT OF THE BRIEF OF RESPONDENT

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QUESTION PRESENTED

DOES THE RESERVATION TO THE UNITED STATES OF "ALL COAL AND OTHER MINERALS" IN LANDS PATENTED UNDER THE STOCK-RAISING HOMESTEAD ACT, 43 U.S.C. §291, *ET SEQ.*, INCLUDE GRAVEL?

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BRIEF OF *AMICI* WYOMING STOCK GROWERS ASSOCIATION AND STATE OF WYOMING IN SUPPORT OF THE BRIEF OF RESPONDENT

INTEREST OF AMICI

The State of Wyoming and the Wyoming Stock Growers Association, *Amici* in this Court, adopt the Statement of Petitioners, insofar as it is relevant to the question before the District Court and the Court of Appeals.

The Wyoming Stock Growers Association (Stock Growers) participated as an Intervenor in the United States District Court and appears as *amicus curiae* pursuant to written consent of the parties under Rule 36.2 of this Court. Stock Growers is a private, nonprofit corporation established in 1872 under Wyoming law for the purpose of protecting and promoting the interests of the livestock industry. A substantial number of its 1900 members are patentees or successors-in-interest to

patentees under the Stock-Raising Homestead Act (SRHA), 43 U.S.C. § 291, *et seq.* (1976). The immediate interest of the Association and its members is the extent and nature of the ownership rights conferred by such patents.

The State of Wyoming appears as *amicus curiae* pursuant to Rule 36.4 of this Court. Wyoming is vitally interested in the health of the livestock industry, an important element of the State's economy. Although the instant case involves a non-agricultural successor-in-interest to a Stock-Raising Homestead Act patentee, the community most vitally affected is the livestock interest, both in their day-to-day operations and in the nature of the title which they may convey.

Wyoming also purchases large quantities of gravel for the construction of roads and highways. Determination of the ownership of gravel on Stock-Raising Homestead patents is essential in this regard.

SUMMARY OF ARGUMENT

I.

Petitioners' "Question Presented" is not the same as the question which was before the District Court and the Court of Appeals, but is a misstatement of the question there. Such misstatement tends to alter and distort a fair consideration of the litigation.

Gravel is not included within "other minerals" reserved to the United States under Section 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299, whether or not such gravel deposits are susceptible to commercial exploitation (past, present, or future).

II.

Petitioners' recitation of the large acreage affected by the decision in this case serves to emphasize the seriousness of Petitioners' attempted retrospective

classification of gravel as a mineral. Any such classification would disrupt the lives and operations of homesteaders, farmers, and ranchers whose land is composed largely of sand and gravel mixed with soil. Their successful operation, and even their very existence, depends upon free and uninterrupted use of gravel in their farming and ranching operations.

Any classification of gravel as a mineral subject to reservation by the Government would permanently impair the lives and operations of homesteaders, farmers, and ranchers because they depend upon free and uninterrupted use of gravel in their farming and ranching operations.

III.

Prior to 1916, under common law, court decisions, and decisions of the Interior Department, gravel was **not** a mineral. The language of the Stock-Raising Homestead Act must be interpreted with the presumption that Congress was aware of such decisions and interpretations and intended that gravel **not** be considered to be a mineral within the meaning of the Act.

Contemporaneous interpretations that gravel was not a mineral at the time of passage of the 1916 Stock-Raising Homestead Act are controlling.

IV.

The provision of the Surface Resources Act, 30 U.S.C. § 611 (1976), which provides that "No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit" is inconsistent with the holding of the District Court that "the mineral reservation in the SRHA of 1916 is broad enough to include gravel as a mineral." The adoption of the Surface Resources Act, 30 U.S.C. § 611, demonstrates that Congress has never considered gravel to be a mineral.

V.

It is generally accepted that the reservation of minerals in deeds and instruments affecting title does **not** reserve gravel; and a holding of gravel to be a mineral would be unjust, unfair, and a nullification of Congressional intent in passing the SRHA.

The Stock-Raising Homestead Act should be construed to follow the general rule in private reservations that "other minerals" does not include gravel.

ARGUMENT

I. THE TRUE QUESTION PRESENTED

The question presented to the District Court was definitively stated in *Western Nuclear, Inc. v. Andrus*, 475 F.Supp. 654, 656 (D. Wyo. 1979). The issue was stated as follows: "Does the Stock-Raising Homestead Act's reservation 'all the coal and other minerals' include gravel?

The Court of Appeals did not change this question (issue), saying in *Western Nuclear, Inc. v. Andrus*, 664 F.2d 234, 235 (10th Cir. 1981), "Specifically, the question before us is whether gravel is included in the reservation of 'coal and other minerals.' "

It is respectfully suggested that the question now presented to the United States Supreme Court should be the same as that before the Trial Court and the Court of Appeals. Departure from the question presented tends to distort a fair consideration of the litigation as previously resolved, and to inject factors in addition to those previously weighed by the Court.

II. THE IMPORTANCE OF THE QUESTION PRESENTED

The Stock Growers are in agreement with Petitioners that the question of whether or not gravel is

included in the SRHA of 1916 reservation of "coal and other minerals" is of utmost importance. In fact, it is vital to the thousands of farmers, ranchers, stockgrowers, and other persons whose livelihood depends upon free access to and use of the sand and gravel on their farms and ranches. Gravel is generally found in tracts constituting an integral part of the surface, making its use an absolute necessity to the successful operation of agricultural pursuits.

The Court can take judicial notice of the article at pp. 6 and 7 in the January 1981 issue of "Cow Country." (See Appendix I). This shows that the operations of the individual cattlemen are relatively small. Sixty percent (60%) of the ranchers raise less than one hundred (100) head of cattle. The figures in the "Cow Country" article are substantiated by pp. 8 and 9 of the official publication of "Wyoming Agricultural Statistics 1980," published by the Wyoming Crop and Livestock Reporting Service. (See Appendix II).

These two publications indicate that the majority of persons living on Wyoming farms and ranches which were the original homesteads are "one family" operators who would be seriously burdened by rulings and restrictions which prevented free use of the surfaces of their holdings. Both publications reflect the situation in other states and show that most farmers and stockgrowers are small operators.

III. CONGRESS, WHEN THE STOCK-RAISING HOMESTEAD ACT OF 1916 WAS PASSED, WAS AWARE THAT COURTS AND THE DEPARTMENT OF INTERIOR HAD HELD GRAVEL NOT TO BE A MINERAL

Under both the common law and early court decisions in this nation, sand and gravel were considered **not** to be minerals unless they had exceptional qualities, the rationale being that sand and gravel are part of the

soil itself. 54 AM.Jur.2d, *Mines and Minerals*, § 8 (1971); *Staples v. Young*, 1908 1 Ir.R. 135, 143; *Caledonian Ry. Co. v. Glenboig Union Fireclay Co.*, 1911 A.C. 290, 299, per Lord Loreburn. Many of these earlier cases, determining that sand and gravel ordinarily exist as part of the surface of the land and thus are not minerals, are discussed in *Waring v. Foden*, 1932 1 Ch. 276; Annot., 86 A.L.R. 969-983 1933. The basis for the holdings was well expressed in *Staples v. Young*, 1908 1 Ir.R. 135, Annot., 17 A.L.R. 166 (1922). Discussing whether or not sand was a mineral, the Justice in *Staples* said "If the sand which he has been taking away is not his property, but is reserved as 'mines and minerals,' nothing will be left to him as the occupier and owner of the lands except the 'vesture' of the land."

In accordance with the earlier cases, extant in both common law jurisdictions and the United States, the Department of the Interior in 1910 decided the case of *Zimmerman v. Brunson*, 39 I.D. 310 (1910). In *Zimmerman*, Secretary Ballinger held:

> Deposits of gravel and sand, suitable for mixing with cement for concrete construction, but having no peculiar property or characteristic giving them special value, and deriving their chief value from proximity to a town, do not render the land in which they are found mineral in character within the meaning of the mining laws, or bar entry under the homestead laws, notwithstanding the land may be more valuable on account of such deposits than for agricultural purposes.

In discussing the problem, the Secretary said:

> A search of the standard American authorities has failed to disclose a single one which classifies a deposit such as claimed in this case as

> mineral, nor is the Department aware of any application to purchase such a deposit under the mining laws. This taken into consideration with the further fact that deposits of sand and gravel occur with considerable frequency in the public domain, points rather to a general understanding that such deposits, unless they possess a peculiar property or characteristic giving them a special value, were not to be regarded as mineral.

The *Zimmerman* decision was recognized by the Department of Interior in *Litch v. Scott*, 40 I.D. 467, 469 (1912), as having "foreclosed" the question of the mineral character of gravel. Again in *Bennett v. Moll*, 40 I.D. 584, 585 (1912), the Department followed *Zimmerman*, quoting:

> No special value of this sand over other sand deposits is shown by the evidence, and in view of the fact that deposits of sand occur with considerable frequency in the public domain indicates that such deposits, unless they possess a peculiar property or characteristic giving them a special value, are not to be regarded as mineral.

In *Hughes v. Florida*, 42 I.D. 401, 404 (1913), the Department noted the similarity of the deposit in question with the deposits of sand and gravel in the *Zimmerman* case. Quoting *Zimmerman*, the Department said:

> . . . From the above resume it follows that the Department, in the absence of specific legislation by Congress, will refuse to classify as

> mineral land containing a deposit of material not recognized by standard authority as such, ...

At the time the SRHA was considered, the Department of Interior was firmly and completely committed to the view that gravel was **not** a mineral.

Certainly, there can be no reasonable contention that in 1916, when the Stock-Raising Homestead Act was passed, Congress was unaware of the Department of Interior holdings. The universal rule is that legislative languange will be interpreted according to the presumption that a legislative body was, at the time of passage, aware of existing statutes, rules of statutory construction, and judicial decisions. 1 Sutherland, *Statutory Construction*, Section 45.12 (4th ed. 1973); *Kokoszka v. Belford*, 417 U.S. 642 (1974); *Lorillard v. Pons*, 434 U.S. 575 (1978); *Merrit v. Welsh*, 104 U.S. 694 (1881).

It may be conceded that if there are doubts as to the interpretation of a federal land grant statute, they are to be resolved in favor of the government. *United States v. Union Pacific Railroad*, 353 U.S. 112, 116 (1957). However, there can be **no** doubt as to the proper interpretation of the reservation in the SRHA, particularly in the face of previous decisions. The *Zimmerman* opinion by the Secretary of Interior, holding that gravel was not **then** a mineral, is especially compelling when viewed in light of the fact that the Department of Interior on **three occasions** thereafter approved the holding.

It is true that the 1910 decisions of the Secretary of the Interior in *Zimmerman, supra*, was later overruled by the Department, but no such later decision can, in retrospect, affect the circumstance of Congress being fully aware that the Department had held gravel **not** to be a mineral at and prior to the time the SRHA was considered and adopted by Congress.

Aside from the general rule that a legislative body is

presumed to be aware of court decisions when it considers any legislation, the fact that the Land Department in this instance participated in the arrangements for homesteading, and in the actual draft of the SRHA for Congress, presents a situation where petitioner is foreclosed from challenging the effect of the Secretary's decision in *Zimmerman*.

IV. PETITIONERS' CONTENTION THAT GRAVEL IS A MINERAL DIRECTLY CONTRAVENES THE "COMMON VARIETIES" PROVISION OF 30 U.S.C. § 611.

Petitioners' contention in this case is not only untenable because it ignores the passage of the SRHA, but it is also wholly inconsistent with the provisions of the Surface Resources Act, 30 U.S.C. § 611 (1976), which states, "No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws. . . ." Certainly Congress did not intend to say in one statute that gravel is **not** a mineral, and in another statute that it **is** a mineral.

There can be no reasonable or valid justification for holding that for one purpose gravel is a mineral, while for another purpose, it is **not** a mineral.

V. IT IS GENERALLY ACCEPTED THAT THE RESERVATION OF MINERALS IN DEEDS AND INSTRUMENTS AFFECTING TITLE DOES NOT RESERVE GRAVEL; AND A HOLDING OF GRAVEL TO BE A MINERAL WOULD BE UNJUST, UNFAIR, AND A NULLIFICATION OF CONGRESSIONAL INTENT IN PASSING THE SRHA.

In the interpretation of statutes, it cannot be presumed to have been within the legislative intent to enact a law which is inequitable or would produce an unjust result. 73 Am.Jur.2d, *Statutes*, §§ 259 and 260 (1974); *St. Louis, I.M. & S.R. Co. v. Taylor*, 210 U.S. 281 (1908); *McHenry v. Alford*, 168 U.S. 651 (1898); *Carey v. Donahue*, 240 U.S. 430 (1916); *Russell v. Sebastian*, 233 U.S. 195 (1914); *Worthy v. United States*, 328 F.2d 386 (1964); *Quinn v. Butz*, 510 F.2d 743 (1975).

It must be presumed that Congress intended the SRHA to provide adequate means for homesteaders to raise livestock and conduct agricultural operations successfully, and to obtain rights that would permit the establishment of homes so that the West would be developed. In fact, all of the Congressional discussion and debate at the time the SRHA was being considered, indicates that the basic reason for the Act was to promote full and complete use of the land for the development of stock raising and agriculture. Now, to have the Secretary of Interior do an about face, disavowing his predecessor's position, is unfair, inequitable, and ruinous to the persons affected by the SRHA.

The record in the District Court contains numerous affidavits which are entirely **uncontroverted**, disclosing that a substantial portion of the ranches in the Rocky Mountain area are largely comprised of sand and gravel. In this region, most of the acreage of many small ranches consists of gravel beds covered with sparse grass suitable only for grazing and for no other agricultural use.

Sand and gravel is absolutely necessary in the conduct of farming and ranching operations. The ownership of sand and gravel by any agency other than the farm or ranch owner would be so disruptive of normal stock raising and agricultural pursuits that it would destroy the value of a ranch where sand and gravel is severed and placed in other ownership. (District Court R.A., Vol. I, pp. 135, 136, 137, 138, 139, 140, 141, 142,

143, 144; 209, 210, 211, 212, 213, 214, 214a, 215, 216, 217 and 218).

Numerous courts have held that gravel which can not be removed by underground mining operations without destroying the surface is not a mineral. Annot., 95 A.L.R. 2d 843, § 6 (1964); *Holloway Gravel Co. v. McKowen*, 200 La. 917, 9 So.2d 228 (1942); *Harper v. Talladega Co.*, 185 So.2d 388 (Ala. 1966); *State ex rel. Highway Commission v. Trujillo*, 82 N.M. 694, 487 P.2d 122 (1971); *Wulf v. Shultz*, 508 P.2d 896 (Kan. 1973); *W.S. Newell, Inc. v. Randall*, 373 So.2d 1068 (Ala. 1979); *Morrison v. Socolofsky*, 600 P.2d 121 (Colo. App. 1979); *Hovden v. Lind*, 301 N.W.2d 374 (N.D. 1981); *Holland v. Dolese*, 540 P.2d 549 (Okl. 1975).

It is common knowledge, and specifically stated without contradiction in the District Court affidavits, that gravel cannot ordinarily be obtained without destruction of the surface of the land. Gravel is not recovered by shaft or subterranean mining, but only in open pits. More to the point, gravel is a mixture of materials, varying from crushed rock to finer particles and, in some instances, even portions of clay. There are, in most operations, piles of material of various sizes and textures. Accordingly, any gravel operation does more manufacturing than mining. The nature of gravel production makes farming and ranching the only purposes by which its utilization is compatible with the SRHA.

Under the unchallenged evidence before the District Court, gravel is a principal component of all western ranches, and a material absolutely essential in the construction of improvement, betterments, irrigation, drainage, and similar facilities. A decision that gravel is a mineral reserved to the United States would be ruinous to the very activities which Congress intended by the passage of the SRHA in 1916.

CONCLUSION

Analysis of the pre-1916 legal decisions reveals a uniform holding that gravel, being an integral part of the earth's surface, and not separable therefrom without serious injury to the surface rights, was not a mineral. The Secretary of the Interior, under whose auspicies the SRHA was presented to Congress, had so held in the 1910 *Zimmerman* case. In that opinion, he said "a search of the standard American authorities has failed to disclose a single one which classifies a deposit such as claimed in this case [gravel and sand] as a mineral." *Zimmerman, supra,* was not an isolated case, but prior to the passage of the SRHA, had been repeatedly approved by the Department of Interior.

In that setting, there can be no reasonable argument that either the Department of Interior or Congress could have intended gravel to be considered as a mineral under the provisions of the SRHA. Retrospective interpretations to the detriment of persons who acted under the provisions of the SRHA are improper and contrary to accepted judicial determinations.

The present contention of Petitioner that gravel is a mineral, violates the position and conduct of his predecessor in office at the time the SRHA was presented and adopted by Congress. Moreover, any holding that gravel is a mineral, under the provisions of 1916 SRHA, would be both unjust and contrary to the expressed intention of Congress to provide land under conditions suitable for stock raising and farming. There is nothing in the SRHA or in the Congressional proceedings indicating anything to the contrary. To accept the present inconsistent contention of Petitioner would be a perversion of Congressional intention and a cruel hoax on the farmers and ranchers who, in good faith, endured hardships in this western country on the implicit promise that, with the exception of minerals which are subterranean and apart from the surface, they would have uninterrupted ownership of the land.

Finally, words should mean what most literate and knowledgeable people think they mean. No reasonable person has ever thought he did not get the gravel, when purchasing a gravelly tract, because the conveyance from his seller reserved "oil, gas and minerals." No major oil company owning minerals would ever claim to own gravel, in addition to the oil and gas that it intended to buy.

The decision of the Tenth Circuit Court of Appeals was viable, correct, and just. It should be affirmed.

Respectfully submitted,

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APPENDIX I

cow country

January 1981

Executive Vice President

Dean T. Prosser, Jr.

WSGA Number 1

NCA Number 2

Editor's Note: The following comments were made at the November 18 NCA Region V meeting in Boise, Idaho

The Wyoming Stock Growers Association is now 108 years old and, needless to say, is proud of its history and heritage. The first ten years of our organized life was devoted to firming up and stabilizinag the cattle business within the State and establishing legislative action that could govern that business from brand recording, brand inspection, open range laws, roundup regulations and range detective activities.

Once these basics were established, the leadership of the association immediately turned its attention to national disease protection laws in regard to contagious cattle diseases. In 1884 the WSGA annual convention passed a resolution to set up a meeting during the Chicago Stock Show to discuss the general question of contagious disease among cattle in the United States. The group met in November for three days with twelve delegates from Wyoming present. Finalized action from this meeting came down in the form of a four-point recommendation:

1. Recognize the fact that contagious pluro-pneumonia exists in the United States.
2. The disease cannot be controlled or eradicated without action of the federal government cooperating with the state authorities.
3. Provided that a committee should go to Washington to prepare and pass a bill thru Congress to address this matter.
4. Requested that the officers of this convention should call another meeting in Chicago to organize a permanent association to be called the *National Cattle Growers Association*.

As a result of these important meetings, Secretary Tom Sturgis and Judge Joseph Carey, then president of the WSGA, lobbied the "Animal Industry Bill" thru both houses of Congress and as such the WSGA established itself as effective not only at the state and regional levels, but also as an industry leader at the national level. Needless to say, these same leaders were very instrumental in the formation of the first National Cattlemen's Association and several past presidents of the WSGA have served as presidents of the national organization.

This brief bit of nostalgia has been interjected in my opening remarks because I want to establish the pride with which WSGA points to the national associations of the past. In my humble opinion, NCA is now charted on a collision course with the grass roots of the industry it is attempting to represent. *I see a type of executive direction patterned after other professional trade associations which simply cannot work for the cattle industry as it is made up today.*

Somehow the NCA of today has lost sight of the whereabouts of the basic cow-calf operator in its zealousness to tap money sources so that it can grow in the areas of *building headquarters and national staff.*

NCA must realize that the top priority of western Plan B states is to maintain and add to our own membership. In years past, when cattle producers were more plentiful, the WSGA had as many as 2,700 dues-paying members. We now find that number at 2,200 and our only source for new members, aside from new purchasers

of old operations, is the small producer, who raises less than 100 head. While these people certainly have pride in the fact they are cattlemen, it is not their only source of income, and in reality is probably a secondary source.

To better put this into focus, I would like to relate to you the profile of the cattle business in Wyoming. Our survey of assessors tax rolls shows us the following facts:

1. Operations over 1,000 head	3%
2. Operations of 500-999 head	6%
3. Operations 250-499 head	11%
4. Operations 100-249 head	20%
5. Operations 1-99 head	60%
Total	100%

Our total number of ranch and farm units that have cattle is about 5,500. Of these operations the WSGA has membership of 2,200 or about 40% of the maximum potential for membership. This 40% membership owns 80% of the total cattle population in the state as verified by a special U.S.D.A. statistical reporting service survey. At the present time we have 640 NCA members under the Plan B voluntary program. In my opinion we could possibly expand this membership to the 1,000 level if we take the soft-sell approach and do not high pressure ourselves completely out of the program. Beyond this point it is highly questionable if we can ever obtain NCA membership among the remaining 1,200 WSGA members because most of them are small operators that have less than 100 cattle. This, of course, is where the WSGA and the NCA part company when we take a hard look at the so-called Spencer plan for NCA dues and the Plan A program. We cannot go Plan A because to do so would mean the loss of 500 to 1,000 WSGA members, which we are not willing to sacrifice. Let me make it crystal clear at this point that our state association is Number 1 and NCA is Number 2 in every consideration that involves the two groups and we intend to keep it that way.

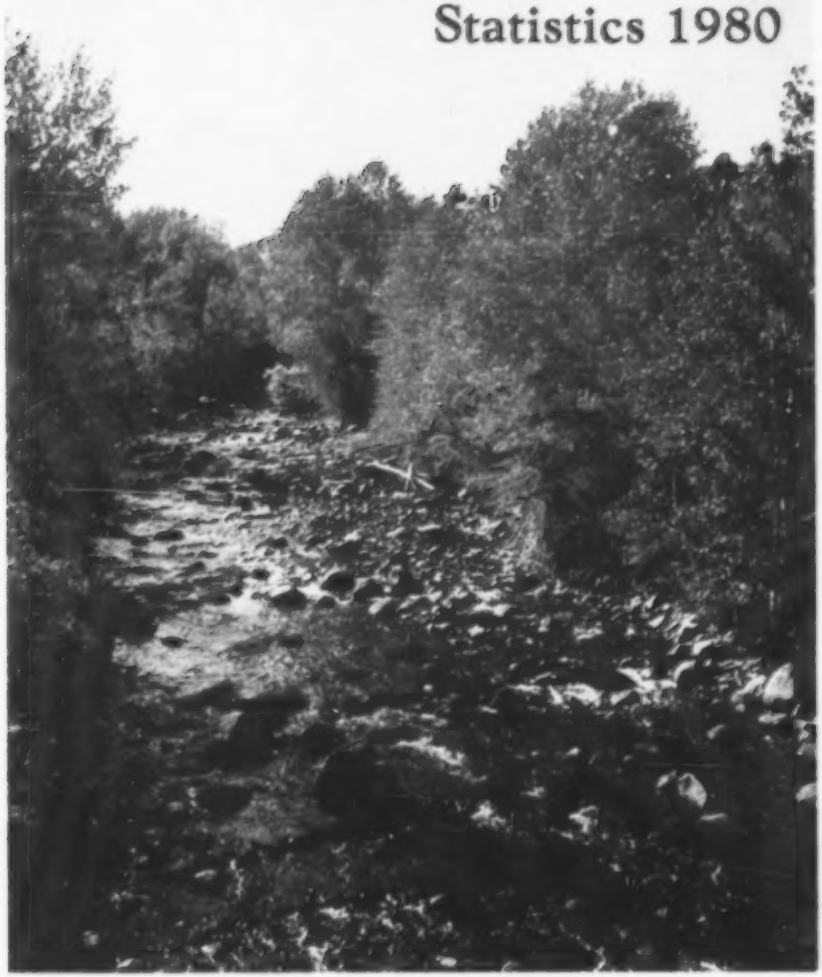
Vice President Tom Prescott graciously invited me to reveal our grievances. I have done this, but I feel obligated to go further than that and suggest some changes which may help to prevent the Johnson County War episode for NCA some time in the future. In my opinion the adoption of the Plan A and Plan B membership program was an *"unintentional"* step in the right direction. What perhaps this Plan A-Plan B program could do is to open up the possibility of adding additional membership dues structures on the downward side, so that the smaller operator can become a member and still feel that he is a welcome part of the association.

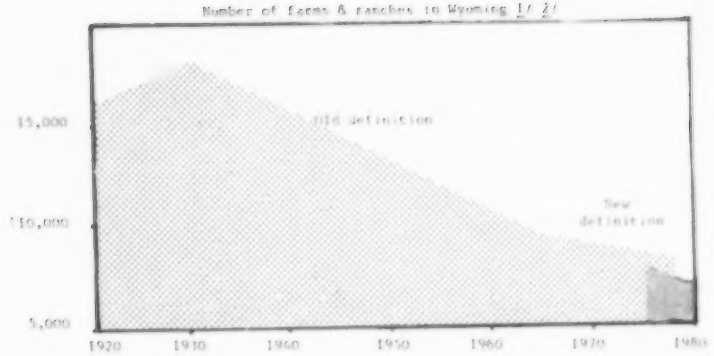
"How powerful NCA could be if its membership roles totaled 500,000 instead of 35,000 as it is now. Maybe,— *just maybe*, by going into a three or four tier membership dues arrangement, this type of membership could be obtained. I would like to see it tried because I know what it did for the WSGA when we went out and obtained 40% of our potential membership for the association. Incidentally, in case you have not punched your calculator, 35,000 NCA members is 2.3% of potential and the 250,000 total affiliate membership is 16.7% of membership potential calculated as being 1½ million producers. In my opinion, dollars buy things and some prestige, but members draw attention and political response to industry needs.

In closing I would like to say that the WSGA plans to carry on its own statewide program and would like to see NCA marching down the same successful path to national prominence and membership support by the entire beef industry.

APPENDIX II

Wyoming Agricultural Statistics 1980





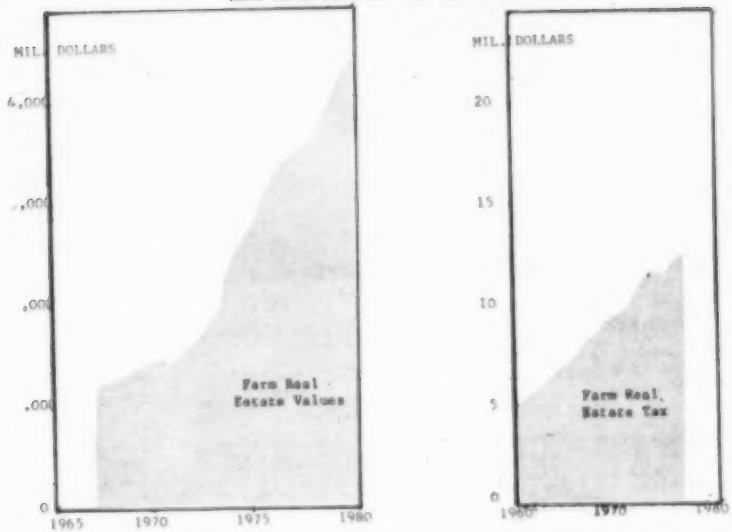
Number of farms and land in farms, Wyoming, selected years, 1920-80 1/ 2/ 3/, U.S. 1980

WYOMING — No. Farms — TOTAL Land in Farms — Average size of farm — WYOMING

Year:	No. Farms: Old definition 1/	No. Farms: New definition 2/	Land in Farms: Old definition 1/	Land in Farms: New definition 2/	Average size of farm: Old definition 1/	Average size of farm: New definition 2/
	Number		1,000 acres		Acres	
1920:	15,800					
1930:	17,900					
1940:	15,400					
1950:	13,100		36,000		2,748	
1960:	10,500		36,100		3,438	
1970:	8,700		35,300		4,080	
1971:	8,600		35,300		4,128	
197	8,500		35,500		4,176	
1973:	8,400		35,600		4,214	
1974:	8,400		35,400		4,214	
1975:	8,300	7,800	35,300	35,200	4,253	4,513
1976:	8,200	7,700	35,300	35,200	4,305	4,571
1977:	8,100	7,500	35,300	35,100	4,358	4,680
1978:	8,000	7,300	35,300	35,100	4,413	4,808
1979:	5/	7,200	5/	35,100	5/	4,875
1980 4/	5/	7,200	5/	35,100	5/	4,875
U.S.						
1980:	5/ 2,309,130		5/ 1,046,713		5/	453

1/ Places of 10 or more acres that had annual sales of agricultural products of $50 or more and places of less than 10 acres that had annual sales of $250 or more. 2/ Places which had annual sales of agricultural products of $1000 or more. Series initiated with 1975. 3/ Data not available for periods blank. 4/ Preliminary. 5/ Series discontinued.

Land Value and Farm Real Estate Tax



Real estate value and taxes: Value of land and buildings and taxes levied on farm real estate, Wyoming 1968-80

Year	Value of land and buildings		Taxes levied on farm real estate 1/		
	Total	Average per acre	Total	Average per acre	Average taxes per $100 of full value
	Million dollars	Dollars	Million dollars	Dollars	Dollars
1968	1,289	36	8.4	.33	.79
1969	1,360	38	9.0	.35	.80
1970	1,445	41	9.4	.37	.80
1971	1,491	42	9.6	.38	.79
1972	1,704	48	10.4	.41	.74
1973	1,988	55	11.4	.45	.70
1974	2,556	70	11.5	.45	.55
1975	2,816	80	11.2	.45	.50
1976	3,309	94	11.9	.48	.45
1977	3,545	101	12.9	.52	.45
1978	3,686	105	2/	2/	2/
1979	4,177	119	2/	2/	2/
1980	4,458	127	2/	2/	2/

1/ Taxes levied in specified year relate to values for the following year.
2/ Not available at time of publication.

Docket Sheet

NO. 81-1686-CFX	TITLE	James G. WATT, Secretary of the Interior, et al., Petitioners v. Western Nuclear, Inc.

DOCKETED	COURT
Mar. 11, 1982	United States Court of Appeals for the Tenth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioners: Solicitor General
	Counsel for Respondent: Harley W. Shaver III
Jan. 29, 1982	Application for an extension of time to file petition for writ of certiorari and order granting same until March 13, 1982 by White, J, on February 3, 1982.
Mar. 11, 1982	Petition for writ of certiorari filed.
Apr. 10, 1982	Brief, amicus curiae, of the State of New Mexico in support of petition filed.
Apr. 19, 1982	Brief for the respondent in opposition filed.
Apr. 21, 1982	DISTRIBUTED. 5-13.
May 7, 1982	Reply brief for the petitioners filed. (D).
May 17, 1982	REDISTRIBUTED. 5-20.
May 24, 1982	Petition GRANTED.

June 17, 1982	Motion of petitioners to dispense with printing the joint appendix filed.
June 21, 1982	DISTRIBUTED. 6-24. (Above motion).
June 28, 1982	The motion of the parties to dispense with printing the joint appendix is GRANTED.
July 1, 1982	Brief for the petitioners filed.
July 30, 1982	Order extending time to file the respondent's brief on the merits until Aug. 13, 1982.
Aug. 2, 1982	Brief, amicus curiae, Wyoming Stock Growers Association filed.
Aug. 13, 1982	Brief for the respondent filed.
Aug. 19, 1982	Brief, amicus curiae, of Eklutna, Inc. filed.
Sept. 15, 1982	CIRCULATED.
Dec. 23, 1982	Reply brief for the petitioners filed. (D).
Jan. 17, 1983	ARGUED.